85-821

No.

Supreme Court, U.S.
FILED
NOV 14 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

In the matter of: STATE OF FLORIDA, DEPARTMENT OF BUSINESS REGULATION, STATE OF FLORIDA, DEPARTMENT OF REVENUE, STATE OF FLORIDA, and THE CITY OF TAMPA, FLORIDA,

Petitioners,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR and DONALD P. HODEL, SECRETARY OF THE INTERIOR, and SEMINOLE TRIBE OF FLORIDA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE DISMISSAL BY THE UNITED STATES MIDDLE DISTRICT COURT OF FLORIDA WHICH DECISION IS IN CONFLICT WITH THIS COURT'S HOLDING IN LAND V. DOLLAR, 330 U.S. 731 (1947), THE ELEVENTH CIRCUIT'S HOLDING IN EATON V. DORCHESTER DEVELOPMENT, INC., 692 F.2d 727 (11th Cir. 1982), FLORIDA DEPARTMENT OF STATE V. TREASURE SALVORS, INC., 458 U.S. 670 (1982) and ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATION, INC. V. CAMP, 397 U.S. 150 (1970).

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OPINIONS BELOW

The opinion of the United State Court of Appeals for the Eleventh Circui for which review is sought is reported a 768 F.2 1248 and is reproduced a Appendix A, infra, page 3a.

The opinion of the United State District Court for the Middle District o Florida is unreported and is reproduce at Appendix A, infra, page 1a.

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit for which review is sought is reported at 768 F.2d 1248 and was rendered on August 16, 1985. No petition for rehearing was filed. The jurisdiction of this Court is invoked under the provisions at 28 U.S.C. Section 1254 (1979).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Amendment XI
Suits Against States

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

5 U.S.C. § 701. Application; definitions

> (a) This chapter applies, according to the provisions thereof, except to the extent that -
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

42 U.S.C. § 1996. Protection and preservation of traditional religions of Native Americans

> On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and

and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

25 U.S.C. § 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignemnt, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: Provided, That no part of such funds shall be used to acquire additional land outside the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the

exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 C.F.R. § 1.2 Applicability of regulations and reserved authority of the Secretary of the Interior.

The regulations in Chapter I of Title 25 of the Code of Federal Regulations are of general application. Notwithstanding any limitations contained in the regulations of this Chapter, the Secretary retains the power to waive or make exceptions to his regulations as found in Chapter I of Title 25 of the Code of Federal Regulations in all cases where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indians.

25 C.F.R. § 151.10 Factors to be considered in evaluating requests.

In evaluating requests for the acquisition of land in trust status, the Secretary shall consider the following factors:

(a) The existence of statutory authority for the acquisition and any limitations contained in such authority;

(b) The need of the individual Indian or the tribe for additioal land;

(c) The purposes for which the land will be used;

(d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for the individual and the degree to which he needs assistance in handling his affairs;

(e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the rax rolls;

(f) Jurisdictional problems and potential conflicts of land use which may arise; and

(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

STATEMENT OF THE CASE

On January 22, 1982, Petitioners filed a complaint in the United States District Court for the Middle District of Florida seeking declaratory and injunctive relief against the United States Department of Interior and its Secretary. The controversy concerns the propriety of the Department's taking title to certain lands in Hillsborough County, Florida, in trust for the Seminole Tribe of Florida under the provisions of 25 U.S.C. Section 465 (1934), 42 U.S.C. Section 1996 (1978) and 25 C.F.R. Section 151 (4-1-85), formerly known as 25 C.F.R. Section 120a. Jurisdiction of the Middle District Court of Florida was invoked pursuant to 28 U.S.C. Section 1331, 1361 and 5 U.S.C. Section 702.

In 1980, the City of Tampa was excavating certain downtown property in preparation for constructing a parking facility. On that site, human remains and artifacts were discovered dating to the 1800's. Archaeological review indicated that some of the remains and artifacts found belonged to persons of Indian ancestry. Based on an agreement between the City of Tampa and the Seminole Indian Tribe, the Seminoles were to secure another site in Hillsborough County on which to re-inter these remains and on which a cultural museum would be built to display the Indian artifacts.

The Seminoles acquired the property located at I-4 and Orient Road in Hillsborough County. This land has never been asserted to be sacred to the Indian religion or necessary for worship or the

performance of any sacred rites. After acquiring title to this property, the Seminoles petitioned the Secretary of the Interior to accept such land in trust for the Seminoles. In that petition, the Seminoles represented that the use of the land would be for the interment site of the Indian remains, a cultural museum for the Indian artifacts found at the excavation site and related activities.

Petitioners have alleged the Secretary exceeded his authority by granting trust status to the Hillsborough property. The Secretary failed to require the Seminoles to comply with the provisions of 25 C.F.R. 151 (4-1-85) (formerly 25 C.F.R. 120a).

Immediately following the acquisition of the Hillsborough County property "in trust" for the Seminoles,

the Seminoles used the property for the operation of a smoke shop, a retail shop selling cigarettes tax free to the non-Indian general public. These operations commenced prior to the Seminoles acquiring the remains and artifacts found at the downtown excavation site. The Seminoles at such smoke shops are not reporting and/or paying cigarette taxes levied pursuant to Chapter 210, Florida Statutes, nor sales tax levied pursuant to Chatper 212, Florida Statutes. Thus, both the State and the City of Tampa are being deprived of substantial tax and revenue sharing funds. And, by virtue of the "trust" status, the land has not been placed on the ad valorem tax roll.

After various extensions of time to answer the pleading, a stay pending

settlement negotiations and an intervention by the Seminole Tribe, the Department and the Secretary on March 23, 1983, filed their Motion to Dismiss arguing that Petitioners lacked standing to maintain this suit, and that the United States was the real party in interest and thus the suit was barred by the doctrine of sovereign immunity. After the Department's motion was filed, but before it was ruled upon, Petitioners filed a Motion to Amend the Complaint accompanied by the proposed amended complaint. The proposed amended complaint added an allegation that the Hillsborough property had not been included among the taxable properties on the 1982 Hillsborough County tax roll and was listed as exempt for the 1983 tax year. Petitioners' motion to amend the

complaint was not ruled upon.

The Department's Motion to Dismiss was granted with prejudice on March 14, 1984, and an appeal was taken to the Eleventh Circuit Court of Appeals.

The Notice of Appeal to the Eleventh Circuit Court was filed on April 12, 1984, and the Petitioners' brief was mailed June 8, 1984. The Department's brief was filed before July 30, 1984, while the Seminole Tribe's brief was received on August 13, 1984. After granting a continuance motion on behalf of the Seminole Tribe, the Eleventh Circuit Court heard the oral arguments in January 1985. The Court affirmed the Middle District Court of Florida on the basis of the U.S.'s sovereign immunity, but did not decide the standing question. This decision was reached August 16,

1985, giving rise to this certiorari petition.

The determination of whether or not title to the property is vested in the United States goes to the heart of the dispute between the parties. The District Court and the Eleventh Circuit erred in basing the dismissal on facial title without examining the circumstances by which title was taken.

Two main reasons support Petitioners position. The United States is not a real party in interest in this case, and the Secretary of the Department of Interior exceeded his authority by waiving, without lawful authority, certain Department rules which afford adequate protection to the States when the state sovereignty is adversely affected or diminished by the trust acquisition.

ARGUMENT I

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ERRED IN DECIDING IT LACKED JURISDICTION OVER A CASE WITHOUT REVIEWING THE MERITS, IN CONFLICT WITH LAND V. DOLLAR, 330 U.S. 731 (1947), AND EATON V. DORCHESTER DEVELOPMENT, INC., 692 F.2d 727 (11th Cir. (1982).

In Land v. Dollar, 330 U.S. 731 (1947), ownership of stock certificates was at issue between the stockholders of Dollar Steamship Line, Inc., Ltd. and the United States Maritime Commission. The District Court on its own motion dismissed with prejudice the complaint of the stockholders holding that the suit was in actuality one against the United States. The Court of Appeals reversed and this Court granted certiorari, characterizing the Dollar case as one where the question of jurisdiction was

dependent on a decision on the merits. Id. at 735.

> ...[I]f the allegations of the petition are true, shares of stock never were property of the United States.... If ownership of the shares was in the United States, suit to recover them would of course be a suit against the United States....
>
> ...We only hold that the District Court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits.

Id. at 738-39.

The merits of Petitioners' case would show the incomplete basis which the Department of Interior was given surrounding the "in trust" property acquisition. The Florida Congressional delegation was asked to support the "in trust" property acquisition for a cultural museum and burial ground for the remains and artifacts discovered in the

downtown Tampa area. However, no information was given to the executive branch of the State government concerning this "in trust" property status. (Appendix 1b-12b).

Land v. Dollar, supra, has been cited recently by the Eleventh Circuit with approval in the case of Eaton, supra. The complaint there based jurisdiction on the Interstate Land Sales Full Disclosure Act which excluded from its coverage subdivisions containing fewer than one hundred lots. Dorchester Development moved for dismissal on the ground that its subdivision contained less than one hundred units. Plaintiffs responded that Dorchester was not exempt because it was part of a larger subdivision containing more than one hundred units. The District Court

dismissed on the ground that Dorchester contained less than one hundred units and was exempt from the Act and thus the court was divested of subject matter jurisdiction. The Eleventh Circuit held that the District Court's dismissal was premature citing to Dollar among other cases. The Court said:

> Where the jurisdictional issues are intertwined with the substantive merits 'the jurisdictional issues should be referred to the merits, for it is impossible to decide one without the other.' (Citations omitted.) (Emphasis added.)

Id. at 733.

Similar to the Eaton case, the issue of whether or not the District Court has jurisdiction depends on the merits of this Petitioners' argument that title in the United States is void. If title is void and hence never vested in the United

States, then the courts have subject matter jurisdiction. Where the jurisdictional issue of whether or not title is in the United States such that sovereign immunity is implicated is intertwined with the substantive merits of whether or not the Secretary's act of taking title in the name of the United States was lawful, the jurisdictional issues should be referred to the merits for it is impossible to decide one without the other. Under the rule of Eaton the District Court's dismissal with prejudice is premature in this action.

In United States v. Lee, 106 U.S. 196 (1882), the estate of Robert E. Lee was acquired by the United States for non-payment of taxes. The taxes in fact had been tendered. An ejectment action was brought against the governmental

custodians of the estate. The trial court found that the tax sale by which the United States had taken title was invalid and that title to the property was in the Plaintiffs. The Supreme Court upheld the trial court and held that a suit against the governmental custodians under these circumstances was not a suit against the sovereign.

Likewise, the United States has acquired the Hillsborough property in trust status by the Secretary's acceptance of the property in an invalid manner. Petitioners alleged that the grant of such status was unlawful, just as the tax sale in Lee was unlawful. The acquisition being invalid, title never vested in the sovereign and the suit is not a suit against the sovereign.

The rule postulated by Lee has since

been limited to require that the allegations show affirmatively any relevant legal limitations on an agency's or official's actions in taking title in the sovereign's name and an assertion that the limitations were exceeded. Larson, supra, and Malone v. Bowdoin, et al, 369 U.S. 588 (1962). As required by Larson, Petitioners here have alleged that 25 C.F.R. Section 1.2 (1960) and 25 C.F.R. Section 151 (4-1-85), formerly known as 25 C.F.R. Section 120a, circumscribe the Secretary's discretion in granting trust status and that those restraints were exceeded by the Secretary when he, without lawful authority, waived his own rules and took title in trust to this property in the name of the sovereign.

Because the allegations in the

Petitioners' complaint comport with the requirements for jurisdiction postulated by Lee as limited by Larson and Malone, the courts have jurisdiction to hear Petitioners' prayer. Any other position would defeat the parameters this Court has set.

ARGUMENT II

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ERRED IN DECIDING THAT SOVEREIGN IMMUNITY DID NOT ALLOW THE PETITIONERS THE OPPORTUNITY FOR JUDICIAL REVIEW WHEN AN OFFICER EXCEEDED HIS AUTHORITY IN CONFLICT WITH FLORIDA DEPARTMENT OF STATE V. TREASURE SALVORS, INC., 458 U.S. 670 (1982).

In applying the sovereign immunity analysis to Eleventh Amendment claims, this Court in Florida Department of State v. Treasure Salvors, Inc., 458

U.S. 670 (1982), said:

> ...The 'settled doctrine of this court wholly precludes the idea that a suit against individuals to recover possession of real property is a suit against the State simply because the defendant holding possession happens to be an officer of the State and asserts that he is lawfully in possession on its behalf.' ... The Court refused to accept the proposition that the 'doors of the courts of justice are ... closed against one legally entitled to possession, by the mere assertion of the defendants that they are entitled to possession for the State.'

Id. at 686-687, quoting from Tindal v. Wesley, 167 U.S. 204 (1897), which in turn relied on Lee (citations omitted).

This Court in Treasure Salvors concluded:

> These cases make clear that the Eleventh Amendment does not bar

> an action against a State official that is based on a theory that the officer acted beyond the scope of his statutory authority or, if within that authority, that such authority is unconstitutional.

Treasure Salvors, Inc., 458 U.S. at 689.

By reversing the analogy and applying this Eleventh Amendment analysis to the issue of sovereign immunity, the sovereign's immunity does not bar an action against a federal official that is based on a theory that the officer acted beyond the scope of his authority. Petitioners alleged that the Secretary and the Department acted beyond the scope of the parameters they set for themselves in 25 C.F.R. Section 1.2 (1960) and 25 C.F.R. Section 151 (4-1-85), formerly known as 25 C.F.R. Section 120a, when they accepted the Hillsborough property

into trust status. Thus, this action is not barred by the immunity of the United States.

It must be noted, the State of Florida does not (and has not) claim(ed) that it is entitled to possession of the land held in trust. Florida's claim is the more superior claim that the State of Florida is the sovereign over this land.

The Secretary is empowered by the Indian Reorganization Act, 25 U.S.C. Sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, 479 (1934), to take land in trust for the Tribe. That power, however, is controlled by the Secretary's own regulations and the complaint properly alleges that in this case those regulations were not followed. Hence, the Secretary's act here was outside the

scope of his authority and was void. The sovereign's immunity is not implicated.

The Secretary has circumscribed his exercise of discretion by the implementation of rules. Section 701(a)(2) of the Administrative Procedure Act, at 5 U.S.C. Section 701(a)(2) (1966), precludes judicial review of agency action committed to agency discretion by law. The Indian Reorganization Act at 25 U.S.C. Section 465 (1934), authorizes the Secretary in his discretion to acquire land in trust for the Tribe. The combined effect of these two sections would appear to prohibit judicial review. The inquiry however does not end here. In the Department's rules, the Secretary reserved discretion only:

To waive or make exceptions to

> his regulations as found in Chapter I of Title 25 of the Code of Federal Regulations in all cases where permitted by law and the Secretary finds that such waiver or exception is in the best interests of the Indians.

25 C.F.R. Section 1.2 (1971). (emphasis added.)

The Secretary cited as authority for waiver under this provision of the Code the Indian Religious Freedom Act, 42 U.S.C. 1996, (1978). There is no language in this law which authorizes waiver of the regulations for acquiring land in trust for the Indians. Nor was the acquired Hillsborough property in the acquisition process ever asserted to be sacred to the Indian religion or necessary for their worship or the performance of any sacred rite.

In the case of Local 2855, AFGE

(AFL-CIO) v. United States, 602 F.2d 574 (3rd Cir. 1979), the Court said:

> Determination that a matter is unreviewable because it is committed to agency discretion does not, however, "slam(s) the door to the courthouse air tight." Even when a court ascertains that a matter has been committed to agency discretion by law, it may entertain charges that the agency's decision ... violates a constitutional, statutory or regulatory command.

Id. at 580 (emphasis supplied.) In Service v. Dulles, 354 U.S. 363 (1957), the challenged act of the Secretary of State was by statute purely discretionary. Nevertheless, this Court held that the act was illegal if it violated the Secretary's regulations. In Vitarelli v. Seaton, 359 U.S. 535 (1959), the Secretary of Interior's action was purely discretionary under statute. By relying on regulations (which but for the

Secretary's citation of them would also have been inapplicable) the Secretary obligated himself to comport with those regulations and his failure to do so rendered his actions void.

The force and effect to be accorded administrative regulations differs depending on whether the regulation is considered merely an internal housekeeping arrangement or whether it bears on individual rights. Brookhaven Housing Coalition v. Kunzig, 341 F.Supp, 1026 (E.D.N.Y. 1972). The regulations surrounding the acquisition of property in trust for Indians are not merely internal housekeeping arrangements, however, and the rule that regulations must be observed even where they impose greater restrictions than the organic act has been applied in situations analogous

to that here at issue. In the case of Brookhaven Housing Coalition, supra, failure of the General Services Administration to abide by its rule requiring consultation with other agencies on community impact before selecting an office building site rendered the selection void. And, in National Association of Greeting Card Publishers v. United States Postal Service, 569 F.2d 570, 601 at n.138 (D.C. Cir. 1976), vacated on other grounds, 434 U.S. 884 (1977), a case involving a challenge to proposed rate increases, the Court required observance of rules having substantial public impact, even where those rules imposed restrictions greater than the restrictions imposed by the Act. In McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955), the Court held that the

Secretary of Interior was bound by his rules with respect to the award of mineral leases. There, those rules had been violated and the award was found to be void. (emphasis added). In Sheridon-Wyoming Coal Co. v. Krug, 172 F.2d 282 (D.C. Cir. 1949), reversed on other grounds, 338 U.S. 621 (1950), the Court found that the Secretary of Interior had followed his regulations for the award of mineral leases and that his action in that case was valid.

In a case remarkably similar to this case, Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970), appeal after remand, 521 F.2d 941 (D.C. Cir. 1975), the Court reversed the District Court's dismissal for lack of jurisdiction. That case was a declaratory judgment action seeking a

declaration of invalidity of FAA action in letting a contract to an unresponsive bidder in violation of FAA rules. The Circuit Court held that sovereign immunity and agency discretion were not bars to the maintenance of the action. Likewise, this case is a declaratory judgment action seeking a declaration of invalidity of the Secretary of Interior's action in taking property into trust status in violation of the Secretary's rules. Likewise, sovereign immunity and agency discretion do not bar the maintenance of this suit.

> In general, even where action is committed to absolute agency discretion by law, courts have assumed the power to review allegations that an agency exceeded its legal authority, acted unconstitutionally, or failed to follow its own regulations.

Garcia v. Neagle, 660 F.2d 983 (4th Cir.

1981) cert. den. 454 U.S. 1153 (1980). See also Ness Investment Corp. v. Department of Agriculture, 512 F.2d 706 (9th Cir. 1975). (emphasis added.)

Violation of an administrative regulation even by the promulgating agency is a violation of the Act pursuant to which the regulation was adopted. Westmoreland v. Laird, 364 F.Supp. 948 (E.D.N.C. 1973), affirmed 485 F.2d 1237 (4th Cir. 1973). The acquisition of land in trust status has great public impact by virtue of restricted revenues, by virtue of restricted State sovereignty, and by virtue of the inability of tax collection and supervisory agencies to fulfill their obligations to the public.

The Secretary gratuitously circumscribed his discretion reserving it only for instances where waiver of his

rules is authorized by law. The law cited by him as authority for waiving his requirements contains no authority for waiver of the regulations. The Secretary is held to observance of his regulations and the courts are empowered to review his acts to determine whether or not the Secretary has exceeded the strictures placed on him by those regulations.

The exercise of its sovereignty by the State of Florida over the Hillsborough property was ousted when the Secretary accepted the Hillsborough property into trust status after unlawfully waiving his own rules. The State of Florida will be detrimentally affected by its inability to collect state taxes from the revenue generated by the establishments created on this "in trust" property. Such interference with

a State's ability to discharge duties and responsibilities has been recognized as the injury in fact necessary to meet the first prong of the Association of Data Processing Service Organization, Inc. v. Camp, 397 U.S. 150 (1970), standing requirement. See Coleman v. Miller, 307 U.S. 433 (1939) (State legislator standing); United States ex rel. Chapman v. Federal Power Commission, 345 U.S. 153 (1953) (Standing of Secretary of Interior to challenge FPC order); Interstate Commerce Commission v. Oregon-Washington Railroad and Navigation Co., 288 U.S. 14 (1933) (State agency standing to challenge ICC order). The second prong of the standing requirement was met when the Petitioners' pleadings showed their interests asserted were within the zone of interests regulated by the Indian

Reorganization Act.

In City of Sault Ste. Marie, Michigan v. Andrus, 458 F.Supp. 465, 468 (D.C. Cir. 1978), the city claimed injury to its revenue and sovereignty by allegedly improper acquisition by Interior of land in trust for the Sault Ste. Marie Tribe of Chippewa Indians. The Dictrict Court held that the city had standing. See also City of Tacoma v. Andrus, 457 F.Supp. 342 (D.C. Cir. 1978), (city alleging injury to tax and police power by Interior's trust acquisition for the Puyallup Tribe had standing.)

The State of Florida has alleged interference with its taxing and enforcement powers over the Hillsborough property and thus has shown the injury in fact necessary to sustain the action.

The action of the Secretary in

accepting the Hillsborough property into trust status divested the State of Florida of its sovereign power over such tract. Where the Secretary in so acquiring land acts outside the parameters set for determining trust status as alleged, the State's divestiture is unlawful and creates an injury in fact conferring standing on the State.

The Secretary's discretion under 25 U.S.C. Section 465 (1934), to accept land into trust status does not permit him to ignore the impact of his decision on state jurisdiction. This is the Secretary's own view:

> In evaluating requests for the acquisition of land in trust status, the Secretary shall consider the following factors:
>
> * * *

> (e) ...The impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;
>
> (f) Jurisdictional problems and potential conflicts of land use which may arise;....

25 C.F.R. Section 151.10 (4-1-85), formerly 25 C.F.R. Section 120a.10.

In Watt v. Energy Action Educational Foundation, 454 U.S. 151 (1981), the State of California, among others, sued the United States and the Secretaries of the Department of Interior and the Department of Energy alleging abuse of discretion as to use of particular bidding systems for the award of oil and gas leases off the coast of California. In response to a standing challenge, this Court found that because a share of the revenues from the leases went to the State of California, California had a

direct financial stake in the actions of the Secretary. California had alleged that the Secretary's actions impaired its share of revenues and the Court held that by so alleging California had asserted the "distinct and palpable injury" required for standing. Id. at 212, citing Warth v. Seldin, 422 U.S. 490 (1975).

As in Watt, the Secretary's failure to follow his own rules and regulations is depriving the State of Florida of revenue to which it is entitled. Florida has been adversely affected by this unlawful action and is being denied the opportunity for review of this injustice.

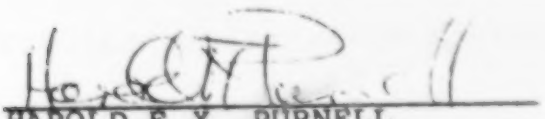
This is a question of vital concern to all the States. The Secretary of the Interior now can establish pockets of

sovereign areas within a State, without that State's ability to review such potentially detrimental action.

The Hillsborough "in trust" property is not adjacent to any reservation lands, in fact, it is far removed from the Okeechobee area. The property is being used for economic purposes which are substantially affecting the State's source of revenue. Without the benefit of review, the Secretary may place pockets of sovereign areas throughout the State to the detriment of the State as a whole.

Therefore, for the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,



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November 13, 1985.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: PETER C. MONSON, ESQUIRE, Land and Natural Resources Division, Washington, D.C. 20530; EDWARD SCHWAKER, ESQUIRE, Department of Justice, Land and Natural Resources Division, Washington, D.C. 20530; CHARLES ROSS, ESQUIRE, P. O. Box 3542, St. Petersburg, Florida 33731; JACK M. SKELDING, JR., ESQUIRE, P. O. Box 669, Tallahassee, Florida 32302; JOSEPH G. SPICOLA, JR., ESQUIRE, City Attorney, City Hall, 305 Jackson Street, Tampa, Florida 33602; ROBERT W. MERKLE, ESQUIRE, United States Attorney, 500 Zack Street, Tampa, Florida 33602; WILLIAM H. COLDIRON, SOLICITOR, Department of Interior, Washington, D.C. 20240; MARTIN W. MATZEN, ESQUIRE and WENDY B. JACOBS, ESQUIRE, Department of Justice, Washington, D.C. 20530; and F. HENRY HABITCHT II, ESQUIRE, Assistant Attorney General, The Justice Building, Washington, D.C. 20530, this 13th day of November, 1985.

HAROLD F.X. PURNELL
General Counsel
Department of Business Regulation

APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

STATE OF FLORIDA and CITY OF TAMPA, FLORIDA Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, and JAMES WATT, Secretary of the Interior, Defendants, and SEMINOLE TRIBE OF FLORIDA, Defendants-Intervenor.	CASE NO. 82-82 Civ-T-K ORDER

This matter is before the Court on the United States' Motion to Dismiss. Having reviewed the motion and supporting memoranda of the United States Department of the Interior, et al. as well as the

memoranda filed by the plaintiff State of Florida, the memoranda filed by defendant-intervenor Seminole Tribe, and being otherwise duly advised in the premises, the Court finds (1) that plaintiffs lack standing to bring this action and (2) that this Court lacks jurisdiction to entertain this action because the sovereign immunity of the United States with respect to the subject matter of the suit has not been waived. Accordingly, it is hereby,

ORDERED AND ADJUDGED that this action is DISMISSED WITH PREJUDICE, each party to bear his or her own costs. The clerk is hereby ordered to enter judgment accordingly.

Done and Ordered in chambers at Tampa, Hillsborough County, Florida, this 14th day of March, 1984.

/s/
ELIZABETH A. KOVACHEVICH
United States District Judge

Prepared by:

/s/
PETER C. MONSON
Attorney, Department of Justice
Land and Natural Resources Division
Washington, D.C. 20530
(202) 724-7430

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-3246

D.C. Docket No. 82-00082

STATE OF FLORIDA, DEPARTMENT OF BUSINESS REGULATION, STATE OF FLORIDA, DEPARTMENT OF REVENUE, STATE OF FLORIDA, and THE CITY OF TAMPA, FLORIDA,

Plaintiffs-Appellants,

versus

UNITED STATES DEPARTMENT OF THE INTERIOR and DONALD P. HODEL, SECRETARY OF THE INTERIOR,

Defendants-Appellees,

SEMINOLE TRIBE OF FLORIDA,

Defendants-Intervenor-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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Before KRAVTICH and JOHNSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United Stats District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that plaintiffs-appellants pay to defendants-appellees and defendant-intervenor-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: August 16, 1985
For the Court: Spencer D. Mercer, Clerk

By: /s/ Warren A. Godfrey
Deputy Clerk

ISSUED AS MANDATE: SEP 9 1985

STATE OF FLORIDA, DEPARTMENT OF BUSINESS REGULATION, State of Florida, Department of Revenue, State of Florida; and the City of Tampa, Florida, Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF the INTERIOR and Donald P. Hodel, Secretary of the Interior, Defendants-Appellees,

Seminole Tribe of Florida, Defendant-Intervenor-Appellee.

No. 84-3246.

United States Court of Appeals, Eleventh Circuit.

Aug. 16, 1985.

Various state agencies and city filed action challenging decision of Secretary of the Interior to acquire a tract of land in trust for the benefit of the Seminole Indian Tribe of Florida. The United States District Court for the Middle District of Florida, Elizabeth A. Kovachevich, J., dismissed the complaint on the basis of sovereign immunity and standing, and state agencies and city appealed. The Court of Appeals, Kravitch, Circuit Judge, held that decision by Secretary to acquire the land was unreviewable as within the Secretary's discretion, where Secretary had congressional authority to acquire the land, and Tribe had interest in land before United States acquired title.

Affirmed.

1. United States ⇐125(1)

United States' sovereign immunity operates as a complete bar to lawsuits, even those filed by the states.

2. United States ⇐125(24)

As a threshold manner in any case in which United States' sovereign immunity is invoked, Court of Appeals must first determine whether suit is one against the United States as sovereign.

3. United States ⇐125(24)

Designation of a federal government agency or officer as party defendant does not avoid problem of United States' sovereign immunity; rather, Court of Appeals must examine issues presented and effect of judgment sought.

4. United States ⇐125(24)

If relief sought requires payment of monies from Federal Treasury, interferes with public administration, or compels or restrains the federal government, action is deemed to be one against the United States as sovereign.

5. United States ⇐125(24)

Only where official's conduct cannot be attributed to sovereign because official had no power to do the challenged acts can it properly be said that the action is not one against United States as sovereign.

6. Indians ⇐10

Secretary of the Interior did not exceed his authority in taking land in trust for benefit of Seminole Indian Tribe of Florida, where Secretary had congressional authorization for the acquisition of land and Tribe had interest in the land before the United States acquired title. Indian Reorganization Act, § 5, 25 U.S.C.A. § 46

Synopsis, Syllabi and Key Number Classification
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The Synopsis, Syllabi and Key Number Classification constitute no part of the opinion of the court.

7. Indians ⇐10

Factors set forth in regulation for Secretary of the Interior to consider in evaluating requests for acquisition of land in trust status are not limits on Secretary's authority to acquire land for benefit of Indians; instead, they are factors to be considered in exercising discretion and, as such, do not constrain Secretary's authority to acquire land in trust for Indians.

8. United States ⇐125(6)

Waivers of sovereign immunity are to be strictly construed.

9. United States ⇐125(22)

No action may be brought to quiet title to lands that the United States holds in trust for an Indian tribe. 28 U.S.C.A. § 2409a.

10. Indians ⇐27(1)

Court of Appeals is loathe to allow suits seeking to determine whether United States has terminated its trust relationship over Indian lands, without some indication of congressional approval.

11. Indians ⇐27(1)
United States ⇐125(32)

Waiver of sovereign immunity by United States in Administrative Procedure Act, 5 U.S.C.A. § 702, did not permit state and city officials to bring action challenging decision of Secretary of the Interior to acquire a tract of land in trust for benefit of Seminole Indian Tribe of Florida; instead, even though action was not one to quiet title but was one to divest United States of its title to land held for benefit of Tribe, action was barred under Quiet Title Act, 28 U.S.C.A. § 2409a, by congressional decision to exempt Indian lands from waiver of sovereign immunity.

12. Indians ⇐10

Congress did not intend to permit third parties to disrupt trust relationship of United States to land held for the Indians. 28 U.S.C.A. § 2409a.

13. Administrative Law and Procedure ⇐701

Exception to judicial review contained in Administrative Procedure Act, 5 U.S.C.A. § 701(a)(2), for action committed to agency discretion by law is a narrow one that must be clearly demonstrated before it can be invoked.

14. Administrative Law and Procedure ⇐701

Extent to which a particular statute confers uninhibited discretion upon an administrator is dependent upon whether statute provides standard against which challenged action can be measured; if there are no judicially manageable standards available for judging how and when agency should exercise its discretion, then it is impossible to determine even whether agency abused its discretion.

15. Indians ⇐32(1)

Through Indian Reorganization Act, § 1 et seq., 25 U.S.C.A. § 461 et seq., Congress sought to foster and encourage self-government among the various Indian tribes.

16. Indians ⇐10

It is of necessity that the Secretary of the Interior have broad discretion when reviewing an application to acquire land for the benefit of an Indian tribe. Indian Reorganization Act, § 5, 25 U.S.C.A. § 465.

17. Indians ⇐32(9)

As a matter of federal law, state was not prohibited from imposing tax on cigarette sales made to non-Indians, even those sales occurring on land held in trust by the United States. Indian Reorganization Act, § 5, 25 U.S.C.A. § 465.

18. Indians ⇐10

Factors set forth in regulation for consideration when Secretary is acting on request for acquisition of land in trust status for benefit of Indians are not "law" that a reviewing court can apply.

19. Indians ⇐10

Decision by Secretary of the Interior to acquire tract of land in trust for benefit of Seminole Indian Tribe of Florida was unreviewable as within the Secretary's discretion, where Secretary had congressional authority to acquire the land, and Tribe had interest in land before United States acquired title. Indian Reorganization Act, § 5, 25 U.S.C.A. § 465.

20. Administrative Law and Procedure ⇐754

Even when decision is committed to agency discretion, court may consider allegations that agency failed to follow its own binding regulations.

Appeal from the United States District Court for the Middle District of Florida.

Before KRAVITCH and JOHNSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

KRAVITCH, Circuit Judge:

This litigation involves the combined efforts of the State of Florida, the Florida Department of Business Regulation, the Florida Department of Revenue, and the City of Tampa (appellants), to challenge the Secretary of the Interior's decision to acquire a tract of land in trust for the benefit of the Seminole Indian Tribe. The court below dismissed their complaint on sovereign immunity and standing grounds. We affirm as to sovereign immunity; accordingly we do not reach the standing question.

I. BACKGROUND

In 1980, the City of Tampa began excavation of land near the former site of Fort Brook, an Army outpost that had been used in the nineteenth century relocation of American Indians living in Florida.[1] During this excavation a construction crew unearthed numerous Indian artifacts and a burial site that included skeletal remains of persons of Indian ancestry. Shortly after this discovery, the City of Tampa agreed to transfer the artifacts and bodies to the Seminole Tribe of Florida, with the understanding that the Seminole Tribe would construct a museum in which the artifacts could be displayed and inter the bodies in the land on which the museum would be built.

The Seminole Tribe purchased an 8.5 acre parcel of land in Hillsborough County, Florida for these purposes, and petitioned the Secretary of the Interior to exercise his authority pursuant to 25 U.S.C.A. § 465 and acquire title to the land in trust for the Indians. Although this statute designates that the decision to acquire land in trust for

1. The facts as stated herein are taken from the allegations of the appellants' complaint.

Indians is one within the Secretary's discretion, the Secretary has promulgated regulations that set forth policies and procedures governing the exercise of this discretion. 25 C.F.R. §§ 151.1-151.13. The Secretary, however, has retained the power to waive these regulations "in all cases where permitted by law and the Secretary finds that such waiver ... is in the best interest of the Indians." 25 C.F.R. § 1.2.

On January 16, 1981, the Department took title to the land in the name of the United States. Mindful of the cultural significance of the land's proposed use, the Secretary decided to waive consideration of the regulations that purport to guide the exercise of his discretion. The Secretary reasoned that this land acquisition was unique, because Congress has directed that preservation of the American Indians' religious and cultural heritage is a national objective. *See* 42 U.S.C.A. § 1996.

Shortly thereafter, the Tribe prepared an interment site for the remains, erected a museum for display of the artifacts, and built a center for exhibiting Indian art and craftware. In addition, the Tribe began operation of a "Smoke Shop" to sell cigarettes, tax free, to the general public. Dismayed by the Tribe's decision to sell cigarettes on this land, appellants commenced this lawsuit against the Department of the Interior and then-Secretary James Watt, alleging that 42 U.S.C.A. § 1996 did not authorize the Secretary to waive consideration of the Department's regulations when acquiring the land in trust. Upon the Seminole Tribe's motion, the district court allowed the Tribe to intervene as a party-defendant. The United States and the Tribe each filed a motion to dismiss, arguing that none of the appellants had standing to maintain this action, and that in any event the suit was prohibited by the United States' sovereign immunity. Appellants sought to amend their complaint, alleging that the Seminole Tribe was also conducting bingo games on the land and refusing to collect the state tax on taxable sales transactions occurring on the land. In addition, appellants contended that the Hillsborough County property tax rolls listed the property as exempt from taxation. Without ruling on the motion to amend, the district court dismissed the complaint with prejudice, holding that the plaintiffs lacked standing and that the court lacked jurisdiction because of sovereign immunity.

II. SOVEREIGN IMMUNITY

A. *Real Party in Interest*

[1-4] The United States' sovereign immunity operates as a complete bar to lawsuits, even those filed by the states. *California v. Arizona*, 440 U.S. 59, 61-62, 99 S.Ct. 919, 921-922, 59 L.Ed.2d 144 (1979); *Minnesota v. United States*, 305 U.S. 382, 387, 59 S.Ct. 292, 294, 83 L.Ed. 235 (1939). As a threshold matter in any case in which sovereign immunity is invoked, we must first determine whether the suit is one against the United States as sovereign. *Panola Land Buyers Association v. Shuman*, 762 F.2d 1550 (11th Cir.1985). Designation of a government agency or officer as party-defendant does not avoid the sovereign immunity problem. *Alabama Rural Fire Insurance Co. v. Naylor*, 530 F.2d 1221, 1225-26 (5th Cir.1976). Rather, we must examine the issues presented and the effect of the judgment sought. If the relief sought requires payment of monies from the Federal Treasury, interferes with public administration, or compels or restrains the government, the action is deemed to be one against the United States

as sovereign. *Stafford v. Briggs*, 444 U.S. 527, 542 n. 10, 100 S.Ct. 774, 784 n. 10, 63 L.Ed.2d 1 (1980); *Dugan v. Rank*, 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed.2d 15 (1963); *Alabama Rural Fire Insurance Co.*, 530 F.2d at 1225 (5th Cir.1976).[2]

Appellants contend that they seek judicial review of agency action, a suit with which the federal courts are quite familiar. Yet, from what we can discern from the sparse record before us, the action specifically challenged, that is, the decision to acquire the land and hold it in trust, was one in which appellants acquiesced when it was made. Only after the Seminole Tribe began selling cigarettes and operating bingo games on the land did appellants register their protest. The relief sought further indicates that the gravamen of appellants' suit is the Seminole Tribe's conduct, not the Secretary's decision to acquire the land. Appellants seek to divest the United States of its title to the land, restoring all parties involved to the status quo ante. With the United States no longer holding title to the land, the state presumably could take steps to end the actions to which it objects. Clearly, this relief would operate against the sovereign. *See Hawaii v. Gordon*, 373 U.S. 57, 83 S.Ct. 1052, 10 L.Ed.2d 191 (1963) (lawsuit seeking to order the United States to convey land to the state of Hawaii); *Minnesota v. United States*, 305 U.S. 382, 59 S.Ct. 292, 83 L.Ed. 235 (1939) (condemnation proceeding against property in which the United States had interest).

[5] Relying on *United States v. Lee*, 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171 (1882), appellants argue that their lawsuit is not one against the United States as sovereign because their contention is that the Secretary exceeded his authority. We disagree. In *Lee*, the Court reviewed a claim that title to property held by the United States was obtained in an unconstitutional manner. If the claim were true, the Court observed, then the government officials exceeded their lawful power when acquiring the property in question. Such an assertion of governmental authority is not insulated from challenge in the courts, because when government officials exceed their authority their actions are not authorized by the sovereign. In such instances, a lawsuit can be maintained against the officials in their individual capacity, without sovereign immunity barring the way. 106 U.S. at 218–221, 1 S.Ct. at 258–262. Subsequent cases make clear that this exception from immunity applies only where the action is challenged as not one of the sovereign because it is alleged to be either unconstitutional or beyond the government agency's statutory authority. *Dugan v. Rank*, 372 U.S. 609, 621–22, 83 S.Ct. 999, 1006–07, 10 L.Ed.2d 15 (1963); *Malone v. Bowdoin*, 369 U.S. 643, 647, 82 S.Ct. 980, 983, 8 L.Ed.2d 168 (1962); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 701–02, 69 S.Ct. 1457, 1467–68, 93 L.Ed. 1628 (1949). Only where the official's conduct cannot be attributed to the sovereign because the official had no power to do the challenged acts can it properly be said that the action is not one against the United States as sovereign. *McClellan v. Kimball*, 623 F.2d 83, 85 (9th Cir.1980); *see also Gardner v. Harris*, 391 F.2d 885, 888 (5th Cir.1968) ("Merely because the Superintendent may have been acting wrongfully in interfering with plaintiff's access to the

2. The Eleventh Circuit, in the en banc decision *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

highway, either as a matter of violation of property rights under the deeds or as a tort under principles of general law, does not amount to circumstances fulfilling the exception that the officer must be acting beyond his statutory powers.").

[6] In the present case, there can be no doubt that there was statutory authority for the Secretary's decision to take the land in trust. 25 U.S.C.A. § 465. Appellants do not challenge the constitutionality of the Secretary's acts, nor the constitutionality of the statute pursuant to which he acted. Nor do they suggest that the Secretary had no statutory authority for taking the land. Indeed, appellants fail to specify precisely what statutory limits on the Secretary's authority were exceeded. *See Larson*, 337 U.S. at 690, 69 S.Ct. at 1461; *Alabama Rural Fire Insurance Co.*, 530 F.2d at 1226. Their only complaint is that the Secretary abused his discretion by waiving consideration of the factors delineated in the regulations.

Appellants cite two regulations, 25 C.F.R. § 151.3, and 25 C.F.R. § 151.10, they claim were waived. They fail to demonstrate, or even allege, how 25 C.F.R. § 151.3[3] was "waived" in this instance. In fact, their own allegations belie this contention, as they admit that the Secretary has congressional authorization for the acquisition, and that the Seminole Tribe had an interest in the land before the United States acquired title.

[7] Turning to the factors listed at 25 C.F.R. § 151.10,[4] we do not consider them to be limits on the Secretary's authority to acquire land for the benefit of Indians. They do not purport to state for what Indian Tribe the Secretary may acquire land, or how much land may be acquired, or even

3. The regulation provides in part:

> Land not held in trust or restricted status may only be acquired for an individual Indian or a tribe in trust status when such acquisition is authorized by an act of Congress. No acquisition of land in trust status, including a transfer of land already held in trust or restricted status, shall be valid unless the acquisition is approved by the Secretary.
>
> (a) Subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may be acquired for a tribe in trust status (1) when the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or, (2) when the tribe already owns an interest in the land or, (3) when the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

25 C.F.R. § 151.3.

4. This regulation provides as follows:

> In evaluating requests for the acquisition of land in trust status, the Secretary shall consider the following factors:
>
> (a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
>
> (b) The need of the individual Indian or the tribe for additional land;
>
> (c) The purposes for which the land will be used;
>
> (d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;
>
> (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from tax rolls;
>
> (f) Jurisdictional problems and potential conflicts of land use which may arise; and
>
> (g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

25 C.F.R. § 151.10.

the circumstances under which the Secretary may use this authority. Rather, they are more precisely labeled as factors to be considered in exercising discretion. As such, they do not constrain the Secretary's authority to acquire land in trust for Indians.[5] We conclude therefore that appellants have failed to demonstrate that the Secretary exceeded his authority.

B. *Waiver of Sovereign Immunity*

Given that the United States is the real party in interest in this litigation, appellants must establish that the United States has waived its immunity with respect to this kind of lawsuit. Appellants point to the waiver of immunity contained in the Administrative Procedure Act (APA), 5 U.S.C.A. §§ 551–706. Section 702 waives federal sovereign immunity for suits against federal officers in which the plaintiff seeks non-monetary relief.

[8] The government responds that by waiving sovereign immunity under the APA, Congress did not mean to alter any existing limitations on the availability of specific relief. H.R.Rep. No. 1656, 94th Cong., 2d Sess., 12–13 (1976), *reprinted in* 1976 U.S.Code Cong. & Ad.News, 6121, 6133. Indeed, the statute specifically provides that it is not to be read as "authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C.A. § 702. The government argues that the waiver of immunity contained within the Quiet Title Act of 1972 (QTA), 28 U.S.C.A. §§ 2409a, 1346(f), and 1402(d), impliedly forbids the relief sought here. In considering the respective positions, we are guided by the principle that waivers of sovereign immunity are to be strictly construed. *United States v. Sherwood*, 312 U.S. 584, 590, 61 S.Ct. 767, 771, 85 L.Ed. 1058 (1941).

[9] With the enactment of the Quiet Title Act, Congress waived the United States' immunity with respect to certain kinds of lawsuits, allowing the United States to be named as a defendant in lawsuits seeking the adjudication of disputed title to land.[6] By its terms the QTA excludes trust or restricted Indian lands from the scope of the waiver of immunity. 28 U.S.C.A. § 2409a. The rationale for this

5. Appellants also argue that the land in question is not trust land because the United States wrongfully failed to follow the proper procedures in acquiring the land. They cite no authority for their proposition, and indeed, to the extent that they ask us to assume the very fact about sovereign land they desire to prove, their assertion is contrary to the law of this circuit. *See Simons v. Vinson*, 394 F.2d 732, 736–37 (5th Cir.), *cert. denied*, 393 U.S. 968, 89 S.Ct. 398, 21 L.Ed.2d 379 (1968). As previously stated, appellants have made no showing that the Secretary exceeded his statutory authority, or that the authority is unconstitutional. Hence, we are unpersuaded that title to the land in question is not held by the United States for the benefit of the Seminole tribe.

6. Prior to this 1972 statute, an adverse claimant could sue for money damages in the nature of just compensation under the Tucker Act, 28 U.S.C. § 1491, or seek relief under 28 U.S.C. § 1410, if the United States claimed a mortgage or other lien on the property. Congress' primary objection to waiving immunity in the past was concern over dispossessing the United States of property on which governmental operations were being performed. H.R.Rep. No. 92-1559, 92d Cong., 2d Sess., (1972), *reprinted in* 1972 U.S.Code Cong. & Ad.News 4547, 4554. Congress therefore provided that in suits brought under the QTA, if a final decision is adverse to the United States, the government may nevertheless choose to retain the land by electing to pay just compensation. 28 U.S.C.A. § 2409a(b).

exclusion is explained briefly in the legislative history:

> The Federal Government's trust responsibility for Indian lands is the result of solemn obligations entered into by the United States Government. The Federal Government has over the years made specific commitments to the Indian people through written treaties and through informal and formal agreements. The Indians, for their part, have often surrendered claims to vast tracts of land. President Nixon has pledged the administration against abridging the historic relationship between the Federal Government and the Indians without the consent of the Indians.

H.R.Rep. No. 1559, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.Code Cong. & Ad.News, 4547, 4556–57. Thus, no action may be brought to quiet title to lands that the United States holds in trust for an Indian tribe. *Carlson v. Tulalip Indian Tribes*, 510 F.2d 1337, 1339 (9th Cir.1975).

In *Block v. North Dakota ex rel. Bd. of Univ. & School Lands*, 461 U.S. 273, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983), the Supreme Court applied the rule of statutory construction that a precisely drawn, detailed statute preempts more general remedies, in holding that the QTA is the exclusive means by which adverse claimants can challenge the United States' title to real property. 103 S.Ct. at 1819. To permit otherwise, the Court reasoned, would allow the QTA's carefully crafted limitations on the availability of relief to be circumvented, thereby rendering the Indian lands exception, among other things, null. 103 S.Ct. at 1818. The Court declined to consider the APA waiver of sovereign immunity as a supplemental remedy to the extent that the QTA would forbid the relief sought, invoking the exception to the APA waiver where another statute forbids the relief sought. 5 U.S.C.A. § 702. 103 S.Ct. at 1819 n. 22.

[10, 11] The government insists that *Block* governs the sovereign immunity question in this case. Appellants quite forcefully contend that this is not a suit to quiet title, because they do not seek to have title to the land quieted in them, nor do they seek recognition of any property interest in the land. Although technically the suit in the instant case is not one to quiet title, we conclude that Congress' decision to exempt Indian lands from the waiver of sovereign immunity impliedly forbids the relief sought here. By forbidding actions to quiet title when the land in question is reserved or trust Indian land, Congress sought to prohibit third parties from interfering with the responsibility of the United States to hold lands in trust for Indian tribes. Here, the appellants seek an order divesting the United States of its title to land held for the benefit of an Indian tribe. That appellants do not assert an adverse claim of title to the land, however, does not lessen the interference with the trust relationship a divestiture would cause.[7] Moreover, Congress chose to preclude an adverse claimant from divesting

7. To be sure, the relief sought here would not prohibit the United States from reacquiring the land in question. Whether the United States would do so is not a matter for our speculation. In any event, Congress chose to exempt trust or restricted Indian lands from the limited provisions of the QTA, which affords the government the option of giving up the land to an adverse claimant who successfully disputes the government's interest, or paying just compensation. 28 U.S.C.A. § 2409a(b). We believe this exhibits Congress' aversion to having third parties interfere with the United States trust relationship with Indian lands.

the United States' title to Indian lands held in trust.[8] It would be anomalous to allow others, whose interest might be lesser than that of an adverse claimant, to divest the sovereign of title to Indian trust lands.[9] Hence we conclude that the APA waiver of immunity is inapplicable in this instance.

[12, 13] Our conclusion that Congress did not intend to permit third parties to disrupt the trust relationship of the United States to land held for the Indians is bolstered by considering that the congressional waiver of immunity under the APA does not "[affect] other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C.A. § 702. Thus, agency action is still unreviewable to the extent that it "is committed to agency discretion by law." 5 U.S.C.A. § 701(a)(2). This exception to judicial review is a narrow one that must be clearly demonstrated before it can be invoked. *Greenwood Utilities Commission v. Hodel*, 764 F.2d 1459, 1464 (11th Cir.1985). In *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), the Supreme Court announced that judicial review of agency action is forbidden by this provision only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" 401 U.S. at 410, 91 S.Ct. at 820 (quoting S.Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)); *see also Heckler v. Chaney*, — U.S. —, 105 S.Ct. 1649, 1655, 84 L.Ed.2d 714 (1985).

[14] The extent to which a particular statute confers uninhibited discretion upon an administrator is dependent upon whether a statute provides standards against which the challenged action can be measured. *American Federation of Government Employees v. Brown*, 680 F.2d 722, 726 (11th Cir.1982), *cert. denied*, 459 U.S. 1104, 103 S.Ct. 728, 74 L.Ed.2d 952 (1983). If there are no judicially manageable standards available for judging how and when an agency should exercise its discretion, then it is impossible to determine even whether the agency abused its discretion. *Heckler*, 105 S.Ct. at 1655; *Greenwood Utilities Commission v. Hodel*, at 1464.

[15] The statute pursuant to which the Secretary acted in acquiring the land in trust provides in pertinent part:

8. Numerous cases have been brought to determine whether the United States has terminated its trust relationship over Indian lands. In each instance, the court recognized that the power to terminate the trust relationship belonged to Congress, observing that Congress' intention to do so must be plain and unambiguous to be effective. *See, e.g., DeCoteau v. District County Court for Tenth Judicial District*, 420 U.S. 425, 444, 95 S.Ct. 1082, 1092, 43 L.Ed.2d 300 (1975); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667–670, 94 S.Ct. 772, 777–779, 39 L.Ed.2d 73 (1974); *United States v. Santa Fe Pacific R.R.*, 314 U.S. 339, 345–47, 62 S.Ct. 248, 251–52, 86 L.Ed. 260 (1941); *Johnson v. M'Intosh*, 8 Wheat. 543, 586, 5 L.Ed. 681 (1823); *Catawba Indian Tribe v. South Carolina*, 718 F.2d 1291, 1296–99 (4th Cir.1983), *adopted after reh'g en banc*, 740 F.2d 305 (4th Cir.1984). Hence, we are loathe to allow suits seeking the relief requested here, without some indication of congressional approval.

9. We recognize that a similar argument was rejected by the court in *City of Sault Ste. Marie v. Andrus*, 458 F.Supp. 465, 471–72 (D.D.C.1978). Several of the claims raised in that case involved allegations that the Secretary acted unconstitutionally or beyond his statutory authority when the United States acquired title to the land. *See City of Sault Ste. Marie v. Andrus*, 532 F.Supp. 157, 160 (D.D.C.1980). To that extent the case is distinguishable, because the Secretary's actions could not be considered to be sovereign acts, thereby precluding the immunity defense.

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to land, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> For the acquisition of such lands ... there is authorized to be appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.
>
> . . . . .
>
> Title to any lands or rights acquired pursuant to [this section] shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired....

25 U.S.C.A. § 465. This statute was enacted as part of the Indian Reorganization Act of 1934, 48 Stat. 984, codified as amended at 25 U.S.C.A. § 461 et seq., the purpose of which was to "rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152, 93 S.Ct. 1267, 1272, 36 L.Ed.2d 114 (1973) (quoting H.R.Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934)). Through this statute, Congress sought to foster and encourage self-government among the various Indian tribes. *Fisher v. District Court of Sixteenth Judicial District of Montana*, 424 U.S. 382, 387, 96 S.Ct. 943, 946, 47 L.Ed.2d 106 (1976). The grant of authority to the Secretary of the Interior to acquire land for the Indians was central to this purpose. Previously, the Federal Government had a policy of allotting plots of land to individual Indians. *See* General Allotment Act of 1887, 24 Stat. 388, codified at, 25 U.S.C.A. § 331 et seq. Having failed to meet the land needs of individual Indians and Indian tribes through this policy, because many of the allotted lands were sold to whites, *see* S.Rep. No. 1080, 73d Cong., 2d Sess., 1-2 (1934), Congress directed that Indian land no longer be allotted, 25 U.S.C.A. § 461, and that alienation of restricted Indian land be prohibited except in certain instances. 25 U.S.C.A. § 464. In addition, Congress extended the existing periods of trust and restrictions on alienation for indefinite periods. 25 U.S.C.A. § 462. To ensure that individual Indians and Indian tribes had land adequate for their self-support, Congress further authorized the acquisition of additional lands for Indians, and provided that land so acquired would be held in trust by the Federal Government. 25 U.S.C.A. § 465.

[16, 17] The statute states that the decision to acquire land is one within the Secretary's discretion. Furthermore, it does not delineate the circumstances under which exercise of this discretion is appropriate, except to prohibit additional acquisitions outside the exterior boundaries of certain reservations. Indeed, the decision to acquire a particular tract of land would involve a myriad of factors, including internal management constraints relating to

budget limits, the particular needs of the numerous individual Indians and Indian tribes, the proposed use of the land, and government resources for overseeing the land. In addition, cooperation of state and local authorities would in many cases be essential. It is of necessity then that the Secretary have broad discretion when reviewing an application for land acquisition.[10]

Appellants contend that law to apply might be found in the regulations set forth at 25 C.F.R. § 151.3, and 25 C.F.R. § 151.10. Appellants fail to demonstrate, or even allege, how 25 C.F.R. § 151.3 provides law to apply in this case. They admit that the Secretary had congressional authority to acquire the land. In addition, they admit that the Tribe had an interest in the land before the United States acquired title. And they do not allege that the Secretary failed to approve the land acquisition.

[18] 25 C.F.R. § 151.10 sets forth factors to be considered when the Secretary is acting on a request for acquisition of land in trust status. We believe that the factors, although they are guides for the exercise of the Secretary's discretion, are not "law" that a reviewing court can apply. The regulation does not purport to state how the agency should balance these factors in a particular case, or what weight to assign to each factor. Nor does it mandate that the Secretary not acquire lands located in particular areas, or limit the size of acquisitions. The factors listed in the regulation are not the kind of legal principles courts are familiar with applying to a particular case.

[19] Our characterization of these regulations is supported by the Supreme Court's decision in *Panama Canal Co. v. Grace Line*, 356 U.S. 309, 78 S.Ct. 752, 2 L.Ed.2d 788 (1958). The petitioner in that case asked the Court to review the amount charged in tolls to ships passing through the Panama Canal. Although the statute prescribing the amount to be charged described in some detail the formula to be applied in fixing the toll, the Court concluded that the decision was one Congress had left to the agency's discretion. 356 U.S. at 317–18, 78 S.Ct. at 757–58. The Court observed that the matter was one "on which experts may disagree" involving "nice issues of judgment and choice ... which require the exercise of informed discretion." 356 U.S. at 317, 78 S.Ct. at 757 (citations omitted); *see also Strickland v. Morton*, 519 F.2d 467 (9th Cir.1975) (Secretary of the Interior's decision that public land was "suitable for disposal" was unre-

10. In their complaint appellants alleged that the land's trust status deprived them of their ability to collect the tax imposed on cigarette sales. The parties quarrel over whether Florida law forbids the taxing of all cigarette sales made by Indians, or just those made on reservation or trust land. Whether and to what extent Florida law prohibits collection of this tax is an issue we need not address. We note only that, as a matter of federal law, Florida is not prohibited from imposing a tax on cigarette sales made to non-Indians, even those occurring on land held in trust by the United States. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 151, 155–57, 100 S.Ct. 2069, 2082–83, 65 L.Ed.2d 10 (1980); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 482–83, 96 S.Ct. 1634, 1645–46, 48 L.Ed.2d 96 (1976); *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310, 317 n. 9 (5th Cir.1981), *cert. denied*, 455 U.S. 1020, 102 S.Ct. 1717, 72 L.Ed.2d 138 (1982). Of course, Hillsborough County is forbidden to tax the land under 25 U.S.C.A. § 465. The county, however, is not a party to this proceeding.

viewable as within the Secretary's discretion despite statute's listing ten "reasons" to guide the decision). Thus, we conclude that in this case the Secretary's decision to acquire the land is unreviewable as within his discretion.

III.

[20] Because this lawsuit is barred by the United States' sovereign immunity, we need not address the standing question. *Block v. Community Nutrition Institute*, — U.S. —, 104 S.Ct. 2450, 2458 n. 4, 81 L.Ed.2d 270 (1984). The decision of the court below is AFFIRMED.[11]

11. Even when a decision is committed to agency discretion, a court may consider allegations that an agency failed to follow its own binding regulations. *See Local 2855, AFGE (AFL–CIO) v. United States*, 602 F.2d 574, 580 (3d Cir.1979). As we stated previously, however, the Secretary did not violate any provision of 25 C.F.R. § 151.3. With respect to 25 C.F.R. § 151.10, given the discretionary balancing to be performed by the Secretary, appellants' real allegation is that the Secretary failed to give what they might consider to be the appropriate weight to particular factors. That, however, would not be grounds for overturning the decision. *See Strickland v. Morton*, 519 F.2d 467, 471 (9th Cir.1975).

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

APPENDIX B

UNITED STATES SENATE

WASHINGTON, D.C. 20510

November 3, 1980

Hon. Cecil D. Andrus
Secretary of the Interior
Interior Building
Washington, D.C. 20240

Dear Mr. Secretary:

We are writing to urge your speedy acceptance of title for lands in Tampa and Tallahassee, Florida in the name of the United States in trust for the Seminole Tribe of Florida as authorized by Section 5 of the Act of June 18, 1934, 48 Stat. 984.

The tribe has purchased land in Tallahassee, the State Capitol of

Florida, for residence when members of the tribe are on official business. This will save money over a period of years and we feel acquisition of the space is a prudent decision by the tribe.

The City of Tampa discovered a Seminole burial ground while excavating land to expand city facilities. Under federal law, the tribe could suspend further excavation and construction on the site, however the tribe and the city have reached an alternative agreement.

The artifacts will be removed to another location in Tampa, and preserved there. The city has given this second site to the Seminoles, in return for the tribe's decision to allow the city to continue excavation and construction on

the original site after removal of the artifacts.

This kind of good faith effort to preserve the tribe's history and meet the City of Tampa's undeniable need for growth is rare indeed, and we see no reason to delay designation of trust status. We thank you for your speedy consideration of the tribe's requests.

Sincerely,

/s/ Lawton Chiles

/s/ Richard (Dick) Stone

Enclosures

Congress of the United States

House of Representatives

Washington, D.C. 20515

December 22, 1980

Stephen Hennington Whilden, Esq.
Counsel
Seminole Tribe of Florida
6073 Stirling Road
Hollywood, Florida 33024

Dear Mr. Whilden:

Thank you for your telegram of December 16th. Jan Stoorza had also advised me of your telephone conversation with her. I am sorry to learn that you feel my letter to the Secretary of the Interior in support of your request to have the Tribe's land acquisition in Hillsborough County taken in trust for the Tribe has caused additional problems. It is my understanding that the Department will consider a new acquisition request which

is in compliance with their recently-published regulations, as requested in their letter of November 25th to Chairman Billie, and I'm sure that if the Tribe wants to enlarge on plans for "economic development" in that material it will receive every consideration.

My letter to the Secretary stated my position. I was pleased to express my support for the planned museum and cemetery. Blanket support for "economic development" would put me in a very awkward position. As you know, matters of land use planning, zoning, etc. are entirely under local jurisdiction, and I have always taken the position that I do not become involved in such matters where I have no jurisdiction.

Sincerely,

/s/

Sam M. Gibbons

United States Congressman

SMG:s

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

Dear Chairman Billie:

I have prepared this letter and requested that the Area Director of the Eastern Area Office personally deliver it to you on my behalf. Representatives of the State of Florida have met with officials of this Department and called to our attention a situation that could have adverse impacts not only on the Seminole

Tribe but could generate repercussions that would impact the interests of other tribes as well. I am referring to the opening of a smokeshop on land near the City of Tampa that the Department accepted in trust status on January 16 of this year.

The acquisition of trust lands pursuant to Section 5 of the Indian Reorganization Act, 25 U.S.C. 465, has been and continues to be an extremely heated political issue. Because of challenges to the Secretary's authority to accept lands in trust for tribes, and being aware that Congress could easily terminate such authority, the Department spent almost two years drafting, holding hearings and getting final approval of land acquisition regulations. These

regulations became final on October 20, 1980.

When the tribe initially approached the Department with its request that land in Tallahassee and Tampa be accepted in trust, the tribe was advised that the Tallahassee parcel would not be considered for trust acquisition but that we would consider the Tampa site for acceptance if the tribe could demonstrate that the acquisition was necessary to safeguard cultural sites in the Tampa area. Based on endorsements from Senators Chiles and Stone and Representatives Gibbons and Fuqua supporting the acquisition for purposes of preserving artifacts and the possible construction of a museum, and based on representations from the tribe that it

intended to be a good neighbor to the City of Tampa, use the land primarily for reinterring remains, the construction of a museum and related activities, and the construction of housing for tribal employees, the Department reconsidered the tribe's request for trust acquisition.

In reliance upon the support of the Florida congressional delegation, (which, it must be reemphasized, was limited to use of the land as a burial site and museum) the City of Tampa's support, and the tribe's representations, the Department took, on the tribe's behalf, an extraordinary action and waived the provisions of our land acquisition regulations, 25 CFR 120a. When the entire scenario surrounding this

acquisition is reviewd, it appears that the tribe failed, if not by design, at least by omission, to reveal its true intentions for the use of this property. The Department's communications with members of Congress and local state officials and its decision to accept the land in trust were predicated on the unique cultural aspects of the Tampa archaeological finds and not as a haven for the tribe to conduct smokeshop operations (or bingo) on a tract of trust land far removed from the tribe's existing reservation.

Because of the furor the tribe's activities on this land has caused and because it could have adverse impacts on the Department's ability to acquire trust lands for other tribes, I feel compelled

to advise you of the possible ramifications of the tribe's actions. First, Congress could curtail or eliminate the Secretary's broad authority to acquire additional trust lands. It could also either remove the Tampa parcel from trust status or set limits for its use. In addition, it is our understanding that the tribe's ability to sell untaxed cigarettes is based on a state law. The next session of the State Legislature begins in January and there is little doubt that the cigarette tax issue will be discussed. The tribe should carefully assess its position, in light of the Supreme Court's recent decision in Washington v. Confederated Colville Tribes, 447 U.S. 134 (1980), if the state law is repealed or modified and with the understanding that although the

Tampa parcel is in trust it is not part of the Seminole Reservation.

In short, I request that the tribe carefully consider the possible impacts of its actions in Tampa, not only for adverse effects on the Seminole Tribe but for possible effects on other tribes who are seeking additional trust lands; and I request that the tribe bring its activities in Tampa in line with the original purpose for which the land was accepted in trust.

Sincerely,

/s/ Roy H. Sampsel

Deputy Assistant Secretary -
Indian Affairs

APPENDIX C

UNITED STATES DISTRICT COURT
OF FLORIDA, MIDDLE DISTRICT

STATE OF FLORIDA: DEPARTMENT OF BUSINESS REGULATION, STATE OF FLORIDA; DEPARTMENT OF REVENUE, STATE OF FLORIDA; and the CIT OF TAMPA, FLORIDA,	:	
Plaintiffs,	:	82-82 Civ-T-H
v.	:	S.P.
UNITED STATES DEPARTMENT OF THE INTERIOR, and JAMES WATT as Secretary of the Interior,	:	
Defendants.	:	

COMPLAINT

The State of Florida; the Department of Business Regulation, State of Florida; the Department of Revenue, State of Florida; and the City of Tampa, Florida sue the United States Department of the Interior and James Watt, successor to Cecil Andrus, as Secretary of the

Interior, for declaratory and injunctive relief and would state:

Jurisdiction

1. Jurisdiction of this Court is invoked pursuant to the authority of 28 U.S.C. 1331, 1361 and 5 U.S.C. 702.

2. This is an action founded on 25 U.S.C. 465 and 42 U.S.C. 1996 and 25 CFR 120a challenging the legal authority of the Secretary of the Interior and/or the Department of Interior's action in taking title in trust for the Seminole Indians of Florida of certain land in Hillsborough County, Florida, more particularly described in Exhibit A.

Parties

3. The State of Florida is a

sovereign entity exercising those powers not reserved to the Federal Government under the United States Constitution, over the lands defined in Art. II, Section 1 of the Florida Constitution, including on and before January 16, 1981 those lands described in Exhibit A.

4. The Department of Business Regulation, State of Florida, is a part of the executive branch of government of the State of Florida, created by Florida Statute 20.16 and exercising those powers enumerated in Chapter 210, Florida Statutes relative to the collection of cigarette taxes and the enforcement of cigarette tax laws within the State of Florida.

5. The Department of Revenue, State of Florida, is a part of the executive branch of government of the State of

Florida created by Florida Statute 20.21 and exercising those powers enumerated in Chapter 212, Florida Statutes, relative to the collection of sales taxes and the enforcement of sales tax laws within the State of Florida and exercising those powers enumerated in Chapter 194-197, Florida Statutes concerning supervision of ad valorem tax laws within the State of Florida.

6. The City of Tampa is a duly created municipality within the State of Florida, County of Hillsborough, exercising all powers authorized by law. The City of Tampa is entitled to receive funds from the Municipal Financial Assistance Trust Fund created and funded pursuant to Florida Statutes 210.20(2)(a) from cigarette tax revenues and the Revenue Sharing Trust Fund for

Municipalities created by Florida Statutes 218.215(2) and funded in part from cigarette tax revenues.

7. The Department of Interior is a part of the executive branch of the government of the United States exercising those powers and duties provided by law. The Department is headed by the Secretary of the Interior who is authorized by law, 25 U.S.C. 465, to take title to property in trust for Indian tribes pursuant to the provisions of 25 CFR 120a entitled "Land Acquisitions."

Facts

8. On or about January 16, 1981, immediately prior to the end of the Carter administration, then Secretary

of Interior Cecil Andrus accepted in trust for the Seminole Indians, title to a parcel of land located at I-4 and Orient Road in Hillsborough County, Florida. The land was officially accepted in trust pursuant to Memorandum dated January 16, 1981 from the Assistant Secretary - Indian Affairs. A copy of said Memorandum is attached hereto and incorporated herein as Exhibit A. Acceptance of land in trust for Indians by the Secretary of the Interior exempts said land from state and local ad valorem taxation, 25 U.S.C. 465, and state and local zoning and land use regulation, 25 CFR 1.4.

9. In accepting title to the land in Hillsborough County in trust for the Seminole Indians, the Secretary of the Interior and/or the Department of

Interior waived compliance with 25 CFR 120a, the Department of Interior rules governing land acquisitions for Indians, based on 25 CFR 1.2 and 42 U.S.C. 1996, the American Indian Religious Freedoms Act. 25 CFR 1.2 provides that the Secretary of the Interior may waive compliance with any rule in 25 CFR where authorized by law. The Secretary of the Interior relied upon the authority of 42 U.S.C. 1996 in waiving compliance with 25 CFR 120a.

10. The aforementioned property came to be acquired in trust when, in 1980, the City of Tampa was excavating certain property (other than described in Exhibit A) relative to the construction of a municipal parking garage. The site of the municipal parking garage was at or near the former location of Ft. Brooke,

an Army outpost which in the 1800's was involved in the relocation of Indians in Florida to areas in the Western part of the United States. In the course of the excavation, a burial site was found containing the skeletal remains of some 129 persons. Archaeological review indicated that some of the remains found belonged to persons of Indian ancestry. Additionally, Indian artifacts were also found at the excavation site. It was agreed between City of Tampa officials and the Seminole Indians that both the Indian skeletal remains and the Indian artifacts would be turned over to the Seminoles who, in turn, would acquire a piece of property for use as an interment site and cultural museum displaying the Indian artifacts.

11. The Seminole Indians acquired

a site of land at I-4 and Orient Road in Hillsborough County, more particularly described in Exhibit A. The said land has never been asserted to be sacred to Indian religion or necessary for worship or the performance of any sacred rites. The Seminole Indians, after acquiring title to such property, petitioned the Secretary of Interior and/or the Department of the Interior to accept such land in trust for the Seminoles, pursuant to 25 U.S.C. 465. In seeking to have the Hillsborough County property taken in trust by the Secretary of the Interior and/or the Department of the Interior, the Seminole Indians represented that the use of the land would be for an interment site for the Indian skeletal remains, a cultural museum for the Indian artifacts found at the aforementioned City of Tampa

excavation site and related activities. See Interior Department letter attached hereto and incorporated herein as Exhibit B.

12. In accepting the property in trust for the Seminole Indians, the Secretary of Interior and the Department of Interior failed to require the Seminole Indians to comply with the provisions of 25 CFR 120a and in particular, 25 CFR 120a.3 and 10. At no time on or prior to January 16, 1981, were any appropriate local, state or federal officials appraised of the intended purpose for which the land would be used by the Seminole Indians and consequently no decision could have been made as to why "in trust" status would be essential for tribal programs.

13. Immediately following the

acquisition of the Hillsborough County property in trust for the Semiole Indians, the Indians commenced utilizing the property for the operation of a "smoke shop," a retail shop selling cigarettes tax free to the non-Indian general public. Such "smoke shop" commenced operation on or about July 14, 1981, prior to the Indians acquiring the Indian skeletal remains and artifacts found at the Ft. Brooke site. The Seminoles at such "smoke shop" are not reporting and/or paying cigarette taxes levied pursuant to Chapter 210, Florida Statutes, nor sales taxes levied pursuant to Chapter 212, Florida Statutes, and thus are depriving the State and the City of Tampa of substantial taxes and revenue sharing funds. Further, Plaintiffs believe that the Seminoles have or will

seek to prevent ad valorem taxes from being levied on said land and property situated thereon.

COUNT I

14. The Plaintiffs reallege the allegations of paragraphs 1-14 of this Complaint.

15. The Secretary of the Interior and/or the Department of the Interior, in accepting the Hillsborough County property in trust status, waived the provisions of 25 CFR 120a on the authority of 42 U.S.C. 1996, the American Indian Religious Freedom Act. Such Act provides:

> On or after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express and exercise the traditional

> religions of the American Indian, Eskimo, Aleut and native Hawaiians, including but not limited to access to sites, use and possession of sacred objects and the freedom to worship through ceremonial and traditional sites.

16. 25 CFR 1.2 authorizes the Secretary of the Interior to waive the requirements of 25 CFR "where permitted by law." 42 U.S.C. 1996 does not authorize or permit the waiver in the instant matter of 25 CFR 120a. The American Indian Religious Freedom Act implements an express congressional purpose to protect particular lands or sites of religious significance to American Indians, but does not in any manner authorize the acquisition of land in trust for Indians where said land is not alleged to be of any religious significance to the Indians.

17. The Hillsborough County tract of land accepted in trust by the Secretary of the Interior is substantially removed from the site of the Ft. Brooke excavation where the Indian skeletal remains and artifacts were found. The I-4 and Orient Road site in Hillsborough County has no particular religious significance to Seminole Indians and, indeed, was never asserted at any time prior to January 16, 1981, to have such significance.

18. The Secretary of the Interior was required to comply with the provisions of 25 CFR 120a in accepting the Hillsborough County property in trust for the Seminole Indians and waiver of the requirements of 25 CFR 120a by the Secretary of the Interior constituted an abuse of discretion, an act made without

observance of procedure required by law, and an unauthorized and void act by reason of the fact that the American Indian Religious Freedom Act is not and was not such authority in law as would authorize the Secretary of the Interior to waive compliance with 25 CFR pursuant to the authority of 25 CFR 1.2.

19. The Plaintiffs are in doubt as to their rights in this matter and as to the effect of the Secretary of the Interior and/or the Department of Interior's action on the State of Florida, the Department of Business Regulation and the Department of Revenue's taxing power and tax supervisory and enforcement power over said land and transactions occurring on said land; and the City of Tampa is in doubt as to its entitlement from the

aforesaid trust funds relative to transactions occurring on said land. A present justifiable controversy exists between the parties.

WHEREFORE, it is respectfully prayed that this Court enter an order declaring the Secretary of the Interior and/or Department of Interior's acquisition of the Hillsborough County property in trust for the Seminole Indians to be void and of no force and effect for failure to comply with the provisions of 25 CFR 120a and enjoining the Secretary of the Interior from treating said property as being held in trust for the Seminole Indians and declaring said land to revert to its original status as it existed prior to January 16, 1981.

/s/	/s/
HAROLD F.X. PURNELL General Counsel Department of Business Regulation 725 S. Bronough Street Tallahassee, FL 32301 (904) 488-7365 Attorney for Department of Business Regulation and City of Tampa	JOSEPH C. MELLICHAMP Assistant Attorney General The Capitol Tallahassee, Florida 32301 (904) 487-2142 Attorney for State of Florida and Department of Revenue

JOSEPH G. SPICOLA, JR.
City Attorney
City Hall
305 Jackson Street
Tampa, Florida 33602
(813) 223-8162

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

JAN 16 1981

Memorandum

To: Commissioner of Indian Affairs

Attn: Area Director, Eastern Area

From: Assistant Secretary - Indian Affairs

Subject: Waiver of 25 CFR § 120a - Trust Acquisition for Seminole Tribe of Florida

I have reviewed the attached file on the request of the Seminole Tribe of Florida for trust acquisition of a tract in Hillsborough County, Florida, and have determined, pursuant to 25 CFR § 1.2, that a waiver of the requirements of 25 CFR § 120a in this case would be in the best interest of the Indians.

This tract will be used to preserve remains of Seminole Indians and artifacts of Seminole culture recently discovered during excavations of a site in Tampa. After discovery, the tribe entered into an agreement with the city in which the tribe agreed to acquire a site for relocation of the remains, to accept the remains on permanent loan from the city, and to do everything within its power to protect and preserve them. The tribe has acquired a site in Hillsborough County, Florida which it will use for this purpose.

The situation presented with this trust acquisition request is an unusual one because of the unique cultural significance of its intended use. Preservation of the tribe's religious

and cultural heritage is a purpose encompassed within the policy which Congress directed the Executive to observe in the American Indian Religious Freedom Act, 92 Stat. 469.

I believe that the unique circumstances bring this acquisition outside the scope of the policy enunciated in the land acquisition regulations at 25 CFR § 120a, in which cultural and religious matters are not specifically addressed, and require that I consider the policy of enunciated in the Religious Freedom Act in addition to factors normally considered when trust acquisitions are made.

Therefore, under authority of 209 DM 8.1 and 25 CFR § 1.2, I hereby waive 25 CFR

§ 120a for purposes of this trust acquisition.

Attachment

/s/

Thomas W. Fredericks

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

JAN 16 1981

Acceptance

Pursuant to the authority of Section 5 of the Indian Reorganization Act of June 18, 1934, 25 U.S.C. 465, and the authority delegated by 209 DM 8.1, I, Thomas W. Fredericks, Assistant Secretary - Indian Affairs, do hereby accept in the name of the United States, in trust for

the Seminole Tribe of Florida, the following described land located in the County of Hillsborough, State of Florida:

That part of the East 1/2 of the N.E. 1/4 of Section 2, T.29 S., R. 19 E., Hillsborough County, Florida, lying Northerly of State Road No. 400 and East of Orient Road, described as follows:

Commencing at the Southwest corner of the North 967.0 feet of the N.E. 1/4 of the N.E. 1/4 of said Section 2; thence run S-89°-14'-33"-E, along the South Boundary of the North 967.0 feet of said N.E. 1/4 of the N.E. 1/4, a distance of 35.47 feet to a point on the East right-of-way line of the 60.0 feet right-of-way for Orient Road for a point of beginning; thence

continue to run S-89°-14'-33"-E, along said South Boundary of the North 967.0 feet, a distance of 526.87 feet to a point; thence run S-00°-11'-46"-W, parallel to the West boundary of the East 1/2 of the N.E. 1/4 of section 2, a distance of 547.28 feet to a point of intersection with the Northerly right-of-way line of State Road No. 400; thence run S-49°-12'-56"-W, along said right-of-way line of State Road No. 400, a distance of 633.60 feet to a point of intersection with the East right-of-way line of Orient Road; thence run the following courses along the East right-of-way line of Orient Road, N-00°-00'-44"-W, a distance of 537.26 feet; thence S-89°-59'-16"-W , a distance of 22.0 feet; thence N-00°-00'-44"-W, a distance of 400.0 feet; thence S-39°-59'-16"-W,

distance of 23.0 feet; thence N-00°-00'-44"-W, a distance of 30.87 feet to the Point of Beginning. Containing 8.589320 Acres, more or less.

Said land having been transferred to the United States by Warranty Deed dated July 11, 1980.

/s/

Thomas W. Fredericks

BEFORE ME, Notary Public, and the undersigned competent witnesses in the place and date set out below, personally came and appeared Thomas Fredericks, as a representative of THE UNITED STATES OF AMERICA, duly authorized by the Act of

June 18, 1934, 48 Stat. 984, who does hereby acknowledge to have received from the seller the property above described, and who declares that he accepts said property for and on behalf of THE UNITED STATES, in trust, for the Seminole Indian Tribe of Florida, its successors and assigns forever.

THUS DONE AND PASSED Before me, Notary, and the undersigned conpetent witnesses, on this 16th day of Jan., 1981, at Washington, D.C.

/s/ Marilyn D Army
Notary

COMM. Exp. 8/31/83

/s/ James F. Canan
Witness

/s/
Witness

85-821

No.

Supreme Court, U.S.
FILED
DEC 2 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

In the matter of: STATE OF FLORIDA, DEPARTMENT OF BUSINESS REGULATION, STATE OF FLORIDA, DEPARTMENT OF REVENUE, STATE OF FLORIDA, and THE CITY OF TAMPA, FLORIDA,

Petitioners,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR and DONALD P. HODEL, SECRETARY OF THE INTERIOR, and SEMINOLE TRIBE OF FLORIDA,

Respondents.

APPENDIX A

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Respectfully submitted,

Harold F.X. Purnell
General Counsel
Department of Business Regulation
725 South Bronough Street
Tallahassee, Florida 32301
(904) 488-7365

STATE OF FLORIDA, DEPARTMENT OF BUSINESS REGULATION, State f Florida, Department of Revenue, State of Florida; and the City of Tampa, Florida, Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF the INTERIOR and Donald P. Hodel, Secretary of the Interior, Defendants-Appellees,

Seminole Tribe of Florida,
Defendant-Intervenor-Appellee.

No. 84-3246.

United States Court of Appeals,
Eleventh Circuit.

Aug. 16, 1985.

Various state agencies and city filed action challenging decision of Secretary of the Interior to acquire a tract of land in trust for the benefit of the Seminole Indian Tribe of Florida. The United States District Court for the Middle District of Florida, Elizabeth A. Kovachevich, J., dismissed the complaint

on the basis of sovereign immunity and standing, and state agencies and city appealed. The Court of Appeals, Kravitch, Circuit Judge, held that decision by Secretary to acquire the land was unreviewable as within the Secretary's discretion, where Secretary had congressional authority to acquire the land, and Tribe had interest in land before United States acquired title.

Affirmed.

1. United States

United States' sovereign immunity operates as a complete bar to lawsuits, even those filed by the states.

2. United States

As a threshold manner in any case in which United States' sovereign immunity is invoked, Court of Appeals must first determine whether suit is one against the

United States as sovereign.

3. United States

Designation of a federal government agency or officer as party defendant does not avoid problem of United States' sovereign immunity; rather, Court of Appeals must examine issues presented and effect of judgment sought.

4. United States

If relief sought requires payment of monies from Federal Treasury, interferes with public administration, or compels or restrains the federal government, action is deemed to be one against the United States as sovereign.

5. United States

Only where official's conduct cannot be attributed to sovereign because official had no power to do the challenged acts can it properly be said

that the action is not one against United States as sovereign.

6. Indians

Secretary of the Interior did not exceed his authority in taking land in trust for benefit of Seminole Indian Tribe of Florida, where Secretary had congressional authorization for the acquisition of land, and Tribe had interest in the land before the United States acquired title. Indian Reorganization Act, § 5,25 U.S.C.A. § 465.

7. Indians

Factors set forth in regulation for Secretary of the Interior to consider in evaluating requests for acquisition of land in trust status are not limits on Secretary's authority to acquire land for benefit of Indians; instead, they are factors to be considered in exercising

discretion and, as such, do not constrain Secretary's authority to acquire land in trust for Indians.

8. United States

Waivers of sovereign immunity are to be strictly construed.

9. United States

No action may be brought to quiet title to lands that the United States holds in trust for an Indian tribe. 28 U.S.C.A. § 2409a.

10. Indians

Court of Appeals is loathe to allow suits seeking to determine whether United States has terminated its trust relationship over Indian lands, without some indication of congresional approval.

11. Indians

United States

Waiver of sovereign immunity by

United States in Administrative Procedure Act, 5 U.S.C.A. § 702, did not permit state and city officials to bring action challenging decision of Secretary of the Interior to acquire a tract of land in trust for benefit of Seminole Indian Tribe of Florida; instead, even though action was not one to quiet title but was one to divest United State of its title to land held for benefit of Tribe, action was barred under Quiet Title Act, 28 U.S.C.A. § 2409a, by congressional decision to exempt Indian lands from waiver of sovereign immunity.

12. Indians

Congress did not intend to permit third parties to disrupt trust relationship of United States to land held for the Indians. 28 U.S.C.A. § 2409a.

13. Administrative Law and Procedure

Exception to judicial review contained in Administrative Procedure Act, 5 U.S.C.A. § 701(a)(2), for action committed to agency discretion by law is a narrow one that must be clearly demonstrated before it can be invoked.

14. Administrative Law and Procedure

Extent to which a particular statute confers uninhibited discretion upon an administrator is dependent upon whether statute provides standard against which challenged action can be measured; if there are no judicially manageable standards available for judging how and when agency should exercise its discretion, then it is impossible to determine even whether agency abused its discretion.

15. Indians

Through Indian Reorganization Act, § 1 et seq., 25 U.S.C.A. § 461 et seq., Congress sought to foster and encourage self-government among the various Indian tribes.

16. Indians

It is of necessity that the Secretary of the Interior have broad discretion when reviewing an application to acquire land for the benefit of an Indian tribe. Indian Reorganization Act, § 5, 25 U.S.C.A. § 465.

17. Indians

As a matter of federal law, state was not prohibited from imposing tax on cigarette sales made to non-Indians, even those sales occurring on land held in trust by the United States. Indian Reorganization Act, § 5, 25 U.S.C.A. § 465.

18. Indians

Factors set forth in regulation for consideration when Secretary is acting on request for acquisition of land in trust status for benefit of Indians are not "law" that a reviewing court can apply.

19. Indians

Decision by Secretary of the Interior to acquire tract of land in trust for benefit of Seminole Indian Tribe of Florida was unreviewable as within the Secretary's discretion, where Secretary had congressional authority to acquire the land, and Tribe had interest in land before United States acquired title. Indian Reorganization Act, § 5, 25 U.S.C.A. § 465.

20. Administrative Law and Procedure

Even when decision is committed to agency discretion, court may consider

allegations that agency failed to follow its own binding regulations.

Appeal from the United States District Court for the Middle District of Florida.

Before KRAVITCH and JOHNSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

KRAVITCH, Circuit Judge:

This litigation involves the combined efforts of the State of Florida, the Florida Department of Business Regulation, the Florida Department of Revenue, and the City of Tampa (appellants), to challenge the Secretary of the Interior's decision to acquire a

tract of land in trust for the benefit of the Seminole Indian Tribe. The court below dismissed their complaint on sovereign immunity and standing grounds. We affirm as to sovereign immunity; accordingly we do not reach the standing question.

I. BACKGROUND

In 1980, the City of Tampa began excavation of land near the former site of Fort Brook, an Army outpost that had been used in the nineteenth century relocation of American Indians living in Florida.[1] During this excavation a construction crew unearthed numerous Indian artifacts and a burial site that

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1. The facts as stated herein are taken from the allegations of the appellants' complaint.

included skeletal remains of persons of Indian ancestry. Shortly after this discovery, the City of Tampa agreed to transfer the artifacts and bodies to the Seminole Tribe of Florida, with the understanding that the Seminole Tribe would construct a museum in which the artifacts could be displayed and inter the bodies in the land on which the museum would be built.

The Seminole Tribe purchased an 8.5 acre parcel of land in Hillsborough County, Florida for these purposes, and petitioned the Secretary of the Interior to exercise his authority pursuant to 25 U.S.C.A. § 465 and acquire title to the land in trust for the Indians. Although this statute designates that the decision to acquire land in trust for Indians is one within the Secretary's discretion,

the Secretary has promulgatd regulations that set forth policies and procedures governing the exercise of this discretion. 25 C.F.R. §§ 151.1-151.13. The Secretary, however, has retained the power to waive these regulations "in all cases where permitted by law and the Secretary finds that such waiver ... is in the best interest of the Indians." 25 C.F.R. § 1.2.

On January 16, 1981, the Department took title to the land in the name of the United States. Mindful of the cultural significance of the land's proposed use, the Secretary decided to waive consideration of the regulations that purport to guide the exercise of his discretion. The Secretary reasoned that this land acquisition was unique, because Congress has directed that preservation

of the American Indians' religious and cultural heritage is a national objective. See 42 U.S.C.A. § 1996.

Shortly thereafter, the Tribe prepared an interment site for the remains, erected a museum for display of the artifacts, and built a center for exhibiting Indian art and craftware. In addition, the Tribe began operation of a "Smoke Shop" to sell cigarettes, tax free, to the general public. Dismayed by the Tribe's decision to sell cigarettes on this land, appellants commenced this lawsuit against the Department of the Interior and then-Secretary James Watt, alleging that 42 U.S.C.A. § 1996 did not authorize the Secretary to waive consideration of the Department's regulations when acquiring the land in trust. Upon the Seminole Tribe's motion,

the district court allowed the Tribe to intervene as a party-defendant. The United States and the Tribe each filed a motion to dismiss, arguing that none of the appellants had standing to maintain this action, and that in any event the suit was prohibited by the United States' sovereign immunity. Appellants sought to amend their complaint, alleging that the Seminole Tribe was also conducting bingo games on the land and refusing to collect the state tax on taxable sales transactions occurring on the land. In addition, appellants contended that the Hillsborough County property tax rolls listed the property as exempt from taxation. Without ruling on the motion to amend, the district court dismissed the complaint with prejudice, holding that the plaintiffs lacked standing and

that the court lacked jurisdiction because of sovereign immunity.

II. SOVEREIGN IMMUNITY

A. Real Party in Interest

[1-4] The United States' sovereign immunity operates as a complete bar to lawsuits, even those filed by the states. California v. Arizona, 440 U.S. 59, 61-62, 99 S.Ct. 919, 921-922, 59 L.Ed.2d 144 (1979); Minnesota v. United States, 305 U.S. 382, 387, 59 S.Ct. 292, 294, 83 L.Ed. 235 (1939). As a threshold matter in any case in which sovereign immunity is invoked, we must first determine whether the suit is one against the United States as sovereign. Panola Land Buyers Association v. Shuman, 762 F.2d 1550 (11th Cir. 1985). Designation of a

government agency or officer as a party-defendant does not avoid the sovereign immunity problem. Alabama Rural Fire Insurance Co. v. Naylor, 530 F.2d 1221, 1225-26 (5th Cir. 1976). Rather, we must examine the issues presented and the effect of the judgment sought. If the relief sought requires payment of monies from the Federal Treasury, intereferes with public administration, or compels or restrains the government, the action is deemed to be one against the United States as sovereign. Stafford v. Briggs, 444 U.S. 527, 542 n. 10, 100 S.Ct. 774, 784 n. 10, 63 L.Ed.2d 1 (1980); Dugan v. Rank, 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed.2d 15 (1963); Alabama Rural Fire Insurance Co., 530 F.2d at 1225 (5th Cir.

1976).[2]

Appellants contend that they seek judicial review of agency action, a suit with which the federal courts are quite familiar. Yet, from what we can discern from the sparse record before us, the action specifically challenged, that is, the decision to acquire the land and hold it in trust, was one in which appellants acquiesced when it was made. Only after the Seminole Tribe began selling cigarettes and operating bingo games on the land did appellants register their protest. The relief sought further indicates that the gravamen of appellants' suit is the Seminole Tribe's

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2. The Eleventh Circuit, in the en banc decision Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

conduct, not the Secretary's decision to acquire the land. Appellants seek to divest the United States of its title to the land, restoring all parties involved to the status quo ante. With the United States no longer holding title to the land, the state presumably could take steps to end the actions to which it objects. Clearly, this relief would operate against the sovereign. See Hawaii v. Gordon, 373 U.S. 57, 83 S.Ct. 1052, 10 L.Ed.2d 191 (1963) (lawsuit seeking to order the United States to convey land to the state of Hawaii); Minnesota v. United States, 305 U.S. 382, 59 S.Ct. 292, 83 L.Ed. 235 (1939) (condemnation proceeding against property in which the United States had interest).

[5] Relying on United States v. Lee, 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed.

171 (1882), appellants argue that their lawsuit is not one against the United States as sovereign because their contention is that the Secretary exceeded his authority. We disagree. In Lee, the Court reviewed a claim that title to property held by the United States was obtained in an unconstitutional manner. If the claim were true, the Court observed, then the government officials exceeded their lawful power when acquiring the property in question. Such an assertion of governmental authority is not insulated from challenge in the courts, because when government officials exceed their authority their actions are not authorized by the sovereign. In such instances, a lawsuit can be maintained against the officials in their individual capacity, without sovereign immunity

barring the way. 106 U.S. at 218-221, 1 S.Ct. at 258-262. Subsequent cases make clear that this exception from immunity applies only where the action is challenged as not one of the sovereign because it is alleged to be either unconstitutional or beyond the government agency's statutory authority. Dugan v. Rank, 372 U.S. 609, 621-22, 83 S.Ct. 999, 1006-07, 10 L.Ed.2d 15 (1963); Malone v. Bowdoin, 369 U.S. 643, 637, 82 S.Ct. 980, 983, 8 L.Ed.2d 168 (1962); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 701-02, 69 S.Ct. 1457, 1467-68, 93 L.Ed. 1628 (1949). Only where the official's conduct cannot be attributed to the sovereign because the official had no power to do the challenged acts can it properly be said that the action is not one against the United States as

sovereign. McClellan v. Kimball, 623 F.2d 83, 85 (9th Cir. 1980); see also Gardner v. Harris. 391 F.2d 885, 888 (5th Cir. 1968) ("Merely because the Superintendent may have been acting wrongfully in interfering with plaintiff's access to the highway, either as a matter of violation of property rights under the deeds or as a tort under principles of general law, does not amount to circumstances fulfilling the exception that the officer must be acting beyond his statutory powers.").

[6] In the present case, there can be no doubt that there was statutory authority for the Secretary's decision to take the land in trust. 25 U.S.C.A. § 465. Appellants do not challenge the constitutionality of the Secretary's acts, nor the constitutionality of the

statute pursuant to which he acted. Nor do they suggest that the Secretary had no statutory authority for taking the land. Indeed, appellants fail to specify precisely what statutory limits on the Secretary's authority were exceeded. See Larson, 337 U.S. at 690, 69 S.Ct. at 1461; Alabama Rural Fire Insurance Co., 530 F.2d at 1226. Their only complaint is that the Secretary abused his discretion by waiving consideration of the factors delineated in the regulations.

Appellants cite two regulations, 25 C.F.R. § 151.3, and 25 C.F.R. § 151.10, they claim were waived. They fail to demonstrate, or even allege, how 25

C.F.R. § 151.3[3] was "waived" in this instance. In fact, their own allegations belie this contention, as they admit that the Secretary has congressional authorization for the acquisition, and that the Seminole Tribe had an interest

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3. The regulation provides in part:

Land not held in trust or restricted status may only be acquired for an individual Indian or a tribe in trust status when such acquisition is authorized by an act of Congress. No acquisition of land in trust status, including a transfer of land already held in trust or restricted status, shall be valid unless the acquisition is approved by the Secretary.

(a) Subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may be acquired for a tribe in trust status (1) when the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or, (2) when the tribe already owns an interest in the land or, (3) when the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

25 C.F.R. § 151.3.

in the land before the United States acquired title.

[7] Turning to the factors listed at 25 C.F.R. § 151.10,[4] we do not consider

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4. This regulation provides as follows:

In evaluating requests for the acquisition of land in trust status, the Secretary shall consider the following factors:

(a) The existence of statutory authority for the acquisition and any limitations contained in such authority;

(b) The need of the individual Indian or the tribe for additional land;

(c) The purposes for which the land will be used;

(d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;

(e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from tax rolls;

(f) Jurisdictional problems and potential conflicts of land use which may arise; and

(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status. 25 C.F.R. § 151.10.

them to be limits on the Secretary's authority to acquire land for the benefit of Indians. They do not purport to state for what Indian Tribe the Secretary may acquire land, or how much land may be acquired, or even the circumstances under which the Secretary may use this authority. Rather, they are more precisely labeled as factors to be considered in exercising discretion. As such, they do not constrain the Secretary's authority to acquire land in trust for Indians.[5] We conclude therefore that appellants have failed to demonstrate that the Secretary exceeded his authority.

5. Appellants also argue that the land in question is not trust land because the United States wrongfully failed to follow the proper procedures in acquiring the land. They cite no authority for their proposition, and indeed, to the extent that they ask us to assume the very fact about sovereign land they desire to prove, their assertion is contrary to the law of this circuit. See Simons v. Vinson, 394 F.2d 732, 736-37 (5th Cir.), cert. denied, 393 U.S. 968, 89 S.Ct. 398, 21 L.Ed.2d 379 (1968). As previously stated, appellants have made no showing that the Secretary exceeded his statutory authority, or that the authority is unconstitutional. Hence, we are unpersuaded that title to the land in question is not held by the United States for the benefit of the Seminole tribe.

B. Waiver of Sovereign Immunity

Given that the United States is the real party in interest in this litigation, appellants must establish that the United States has waived its immunity with respect to this kind of lawsuit. Appellants point to the waiver of immunity contained in the Administrative Procedure Act (APA), 5 U.S.C.A. §§ 551-706. Section 702 waives federal sovereign immunity for suits against federal officers in which the plaintiff seeks non-monetary relief.

[8] The government responds that by waiving sovereign immunity under the APA, Congress did not mean to alter any existing limitations on the availability of specific relief. H.R.Rep. No. 1656, 94th Cong., 2d Sess., 12-13 (1976), reprinted in 1976 U.S.Code Cong. & Ad.

News, 6121, 6133. Indeed, the statute specifically provides that it is not to be read as "authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C.A. § 702. The government argues that the waiver of immunity contained within the Quiet Title Act of 1972 (QTA), 28 U.S.C.A. §§ 2409a, 1346(f), and 1402(d), impliedly forbids the relief sought here. In considering the respective positions, we are guided by the principle that waivers of sovereign immunity are to be strictly construed. United States v. Sherwood, 312 U.S. 584, 590, 61 S.Ct. 767, 771, 85 L.Ed. 1058 (1941).

[9] With the enactment of the Quiet Title Act, Congress waived the United States' immunity with respect to certain

kinds of lawsuits, allowing the United States to be named as a defendant in lawsuits seeking the adjudication of disputed title to land.[6] By its terms the QTA excludes trust or restricted Indian lands from the scope of the waiver of immunity. 28 U.S.C.A. § 2409a. The rationale for this exclusion is explained briefly in the legislative history:

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6. Prior to this 1972 statute, an adverse claimant could sue for money damages in the nature of just compensation under the Tucker Act, 28 U.S.C. § 1491, or seek relief under 28 U.S.C. § 1410, if the United States claimed a mortgage or other lien on the property. Congress' primary objection to waiving immunity in the past was concern over dispossessing the United States of property on which governmental operations were being performed. H.R.Rep. No. 92-1559, 92d Cong., 2d Sess., (1972), reprinted in 1972 U.S.Code Cong. & Ad. News 4547, 4554. Congress therefore provided that in suits brought under the QTA, if a final decision is adverse to the United States, the government may nevertheless choose to retain the land by electing to pay just compensation. 28 U.S.C.A. § 2409a(b).

> The Federal Government's trust reponsibility for Indian lands is the result of solemn obligations entered into by the United States Government. The Federal Government has over the years made specific commitments to the Indian people through written treaties and through informal and formal agreements. The Indians, for their part, have often surrendered claims to vast tracts of land. President Nixon has pledged the administration against abridging the historic relationship between the Federal Government and the Indians without the consent of the Indians.

H.R.Rep. No. 1559, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S.Code Cong. & Ad.News, 4547, 4556-57. Thus, no

action may be brought to quiet title to lands that the United States holds in trust for an Indian tribe. Carlson v. Tulalip Indian Tribes, 510 F.2d 1337, 1339 (9th Cir. 1975).

In Block v. North Dakota ex rel. Bd. of Univ. & School Lands, 461 U.S. 273, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983), the Supreme Court applied the rule of statutory construction that a precisely drawn, detailed statute preempts more general remedies, in holding that the QTA is the exclusive means by which adverse claimants can challenge the United States' title to real property. 103 S.Ct. at 1819. To permit otherwise, the Court reasoned, would allow the QTA's carefully crafted limitations on the availability of relief to be circumvented, thereby rendering the Indian

lands exception, among other things, null. 103 S.Ct. at 1818. The Court declined to consider the APA waiver of sovereign immunity as a supplemental remedy to the extent that the QTA would forbid the relief sought, invoking the exception to the APA waiver where another statute forbids the relief sought. 5 U.S.C.A. § 702. 103 S.Ct. at 1819 n. 22.

[10,11] The government insists that Block governs the sovereign immunity question in this case. Appellants quite forcefully contend that this is not a suit to quiet title, because they do not seek to have title to the land quieted in them, nor do they seek recognition of any property interest in the land. Although technically the suit in the instant case is not one to quiet title, we conclude that Congress' decision to exempt Indian

lands from the waiver of sovereign immunity impliedly forbids the relief sought here. By forbidding actions to quiet title when the land in question is reserved or trust Indian land, Congress sought to prohibit third parties from interfering with the responsibility of the United States to hold lands in trust for Indian tribes. Here, the appellants seek an order divesting the United States of its title to land held for the benefit of an Indian tribe. That appellants do not assert an adverse claim of title to the land, however, does not lessen the interference with the trust relationship a divesture would cause.[7] Moreover, Congress chose to preclude an adverse claimant from divesting the United States' title to Indian lands held in trust.[8] It would be anomalous to

7. To be sure, the relief sought here would not prohibit the United States from reacquiring the land in question. Whether the United States would do so is not a matter for our speculation. In any event, Congress chose to exempt trust or restricted Indian lands from the limited provisions of the QTA, which affords the government the option of giving up the land to an adverse claimant who sucessfully disputes the government's interest, or paying just compensation. 28 U.S.C.A. § 2409a(b). We believe this exhibits Congress' aversion to having third parties interfere with the United States trust relationship with Indian lands.

8. Numerous cases have been brought to determine whether the United States has terminated its trust relationship over Indian lands. In each instance, the court recognized that the power to terminate the trust relationship belonged to Congress, observing that Congress' intention to do so must be plain and unambiguous to be effective. See, e.g. DeCoteau v. District County Court for Tenth Judicial District, 420 U.S. 425, 444, 95 S.Ct. 1082, 1092, 43 L.Ed.2d 300 (1975); Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667-70, 94 S.Ct. 772, 777-79, 33 L.Ed.2d 73 (1974); United States v. Santa Fe Pacific R.R., 314 U.S. 339, 345-47, 62 S.Ct. 248, 251-52, 86 L.Ed. 260 (1941); Johnson v. M'Intosh, 8 Wheat. 543, 586, 5 L.ED. 681 (1823); Catawba Indian Tribe v. South Carolina, 718 F.2d 1291, 1296-99 (4th Cir. 1983), adopted after reh'g en banc, 740 F.2d 305 (4th Cir. 1984). Hence, we are loathe to allow suits seeking the relief requested here, without some indication of congressional approval.

allow others, whose interest might be lesser than that of an adverse claimant, to divest the sovereign of title to Indian trust lands.[9] Hence we conclude that the APA waiver of immunity is inapplicable in this instance.

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9. We recognize that a similar argument was rejected by the court in City of Sault Ste. Marie v. Andrus, 458 F.Supp. 465, 471-72 (D.D.C. 1978). Several of the claims raised in that case involved allegations that the Secretary acted unconstitutionally or beyond his statutory authority when the United States acquired title to the land. See City of Sault Ste. Marie v. Andrus, 532 F.Supp. 157, 160 (D.D.C. 1980). To that extent the case is distinguishable, because the Secretary's actions could not be considered to be sovereign acts, thereby precluding the immunity defense.

[12,13] Our conclusion that Congress did not intend to permit third parties to disrupt the trust relationship of the United States to land held for the Indians is bolstered by considering that the congressional waiver of immunity under the APA does not "[affect] other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C.A. § 702. Thus, agency action is still unreviewable to the extent that it "is committed to agency discretion by law." 5 U.S.C.A. § 701(a)(2). This exception to judicial review is a narrow one that must be clearly demonstrated before it can be invoked. Greenwood Utilities Commission v. Hodel, 764 F.2d 1459, 1464 (11th Cir.

1985). In Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), the Supreme Court announced that judicial review of agency action is forbidden by this provision only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" 401 U.S. at 410, 91 S.Ct. at 820 (quoting S.Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)); see also Heckler v. Chaney, --- U.S. ---, 105 S.Ct. 1649, 1655, 84 L.Ed.2d 714 (1985).

[14] The extent to which a particular statute confers uninhibited discretion upon an administrator is dependent upon whether a statute provides standards against which the challenged action can be measured. American Federation of Government Employees v. Brown,

680 F.2d 722, 726 (11th Cir. 1982), cert. denied, 459 U.S. 1104, 103 S.Ct. 728, 74 L.Ed.2d 952 (1983). If there are no judicially manageable standards available for judging how and when an agency should exercise its discretion, then it is impossible to determine even whether the agency abused its discretion. Heckler, 105 S.Ct. at 1655; Greenwood Utilities Commission v. Hodel, at 1464.

[15] The statute pursuant to which the Secretary acted in acquiring the land in trust provides in pertinent part:

The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to land, within or without existing reservations, including trust or

otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands ... there is authorized to be appropriated, a sum not to exceed $2,000,000 in any one fiscal year: Provided, That no part of such funds shall be used to acquire additional land outside the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

. . . . . .

Title to any lands or rights acquired pursuant to [this section] shall be

taken in the name of the United States n trust for the Indian tribe or individual Indian for which the land is acquired....

25 U.S.C.A. § 465. This statute was enacted as part of the Indian Reorganization Act of 1934, 48 Stat. 984, codified as amended at 25 U.S.C.A. § 461 et seq., the purpose of which was to "rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152, 93 S.Ct. 1267, 1272, 36 L.Ed.2d 114 (1973) (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934)). Through this statute, Congress sought to foster and encourage self-government among the various Indian tribes. Fisher v. District Court of

Sixteenth Judicial District of Montana, 424 U.S. 382, 387, 96 S.Ct. 943, 946, 47 L.Ed.2d 106 (1976). The grant of authority to the Secretary of the Interior to acquire land for the Indians was central to this purpose. Previously, the Federal Government had a policy of allotting plots of land to individual Indians. See General Allotment Act of 1887, 24 Stat. 388, codified at 25 U.S.C.A. § 331 et seq. Having failed to meet the land needs of individual Indians and Indian tribes through this policy, because many of the allotted lands were sold to whites, see S.Rep. No. 1080, 73d Cong., 2d Sess., 1-2 (1934), Congress directed that Indian land no longer be allotted, 25 U.S.C.A. § 461, and that alienation of restricted Indian land be prohibited except in certain instances.

25 U.S.C.A. § 464. In addition, Congress extended the existing periods of trust and restrictions on alienation for indefinite periods. 25 U.S.C.A. § 462. To ensure that individual Indians and Indian tribes had land adequate for their self-support, Congress further authorized the acquisition of additional lands for Indians, and provided that land so acquired would be held in trust by the Federal Government. 25 U.S.C.A. § 465.

[16,17] The statute states that the decision to acquire land is one within the Secretary's discretion. Furthermore, it does not delineate the circumstances under which exercise of this discretion is apporpriate, except to prohibit additional acquisitions outside the exterior boundaries of certain reservations. Indeed, the decision to

acquire a particular tract of land would involve a myriad of factors, including internal management constraints relating to budget limits, the particular needs of the numerous individual Indians and Indian tribes, the proposed use of the land, and government resources for overseeing the land. In addition, cooperation of state and local authorities would in many cases be essential. It is of necessity then that the Secretary have broad discretion when reviewing an application for land acquisition.[10]

10. In their complaint appellants alleged that the land's trust status deprived them of their ability to collect the tax imposed on cigarette sales. The parties quarrel over whether Florida law forbids the taxing of all cigarette sales made by Indians, or just those made on reservation or trust land. Whether and to what extent Florida law prohibits collection of this tax in an issue we need not address. We note only that, as a matter of federal law, Florida is not prohibited from imposing a tax on cigarette sales made to non-Indians, even those occurring on land held in trust by the United States. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 151, 155-57, 100 S.Ct. 2069, 2082-83, 65 L.Ed.2d 10 (1980); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 482-83, 96 S.Ct. 1634, 1645-46, 48 L.Ed.2d 96 (1976); Seminole Tribe of Florida v. Butterworth, 658 F.2d 310, 317 n. 9 (5th Cir. 1981), cert. denied, 455 U.S. 1020, 102 S.Ct. 1717, 72 L.Ed.2d 138 (1982). Of course, Hillsborough County is forbidden to tax the land under 25 U.S.C.A. § 465. The county, however, is not a party to this proceeding.

Appellants contend that law to apply might be found in the regulations set forth at 25 C.F.R. § 151.3, and 25 C.F.R. § 151.10. Appellants fail to demonstrate, or even allege, how 25 C.F.R. § 151.3 provides law to apply in this case. They admit that the Secretary had congressional authority to acquire the land. In addition, they admit that the Tribe had an interest in the land before the United States acquired title. And they do not allege that the Secretary failed to approve the land acquisition.

[18] 25 C.F.R. § 151.10 sets forth factors to be considered when the Secretary is acting on a request for acquisition of land in trust status. We believe that the factors, although they are guides for the exercise of the Secretary's discretion, are not "law"

that a reviewing court can apply. The regulation does not purport to state how the agency should balance these factors in a particular case, or what weight to assign to each factor. Nor does it mandate that the Secretary not acquire lands located in particular areas, or limit the size of acquisitions. The factors listed in the regulation are not the kind of legal principles courts are familiar with applying to a particular case.

[19] Our characterization of these regulations is supported by the Supreme Court's decision in Panama Canal Co. v. Grace Line, 356 U.S. 309, 78 S.Ct. 752, 2 L.Ed.2d 788 (1958). The petitioner in that case asked the Court to review the amount charged in tolls to ships passing through the Panama Canal. Although the

statute prescribing the amount to be charged described in some detail the formula to be applied in fixing the toll, the Court concluded that the decision was one Congress had left to the agency's discretion. 356 U.S. at 317-18, 78 S.Ct. at 757-58. The Court observed that the matter was one "on which experts may disagree," involving "nice issues of judgment and choice ... which require the exercise of informed discretion." 356 U.S. at 317, 78 S.Ct. at 757 (citations omitted); see also Strickland v. Morton, 519 F.2d 467 (9th Cir. 1975) (Secretary of the Interior's decision that public land was "suitable for disposal" was unreviewable as within the Secretary's discretion despite statute's listing ten "reasons" to guide the decision). Thus, we conclude that in this case the

Secretary's decision to acquire the land is unreviewable as within his discretion.

III.

[20] Because this lawsuit is barred by the United States' sovereign immunity, we need not address the standing question. Block v. Community Nutrition Institute, --- U.S. ---, 104 S.Ct. 2450, 2458 n. 4, 81 L.Ed.2d 270 (1984). The decision of the court below is AFFIRMED.[11]

11. Even when a decision is committed to agency discretion, a court may consider allegations that an agency failed to follow its own binding regulations. See Local 2855, AFGE (AFL-CIO) v. United States, 602 F.2d 574, 580 (3d Cir. 1979). As we stated previously, however, the Secretary did not violate any provision of 25 C.F.R. § 151.3. With respect to 25 C.F.R. § 151.10, given the discretionary balancing to be performed by the Secretary, appellants' real allegation is that the Secretary failed to give what they might consider to be the appropriate weight to particular factors. That, however, would not be grounds for overturning the decision. See Strickland v. Morton, 519 F.2d 467, 471 (9th Cir. 1975).

85-821

No.

Supreme Court, U.S.
FILED
DEC 13 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October, 1985

In the matter of: STATE OF FLORIDA, DEPARTMENT OF BUSINESS REGULATION, STATE OF FLORIDA, DEPARTMENT OF REVENUE, STATE OF FLORIDA, AND THE CITY OF TAMPA, FLORIDA,

Petitioners,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR and DONALD P. HODEL, SECRETARY OF THE INTERIOR, and SEMINOLE TRIBE OF FLORIDA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT, SEMINOLE TRIBE OF FLORIDA, BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

WHETHER THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS IN THIS CAUSE CONFLICTS WITH THIS COURT'S DECISIONS IN LAND v. DOLLAR, 330 U.S. 731, 94 L.Ed. 1209, 67 S.Ct. 1009 (1947), FLORIDA DEPARTMENT OF STATE v. TREASURE SALVORS, INC., 458 U.S. 670, 73 L.Ed.2d 1057, 102 S.Ct. 3304 (1982), ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATION, INC. v. CAMP, 397 U.S. 150, 25 L.Ed.2d 184, 90 S.Ct. 827 (1970), AND THE ELEVENTH CIRCUIT'S DECISION IN EATON v. DORCHESTER DEVELOPMENT, INC., 692 F.2d 727 (11th Cir. 1982).

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OPINIONS AND JUDGMENTS DELIVERED IN COURTS BELOW

The Respondent, Seminole Tribe of Florida, accepts the Petitioners' statements regarding judgments and opinions delivered in the courts below.

JURISDICTION

The Respondent, Seminole Tribe of Florida, accepts the Petitioners' statement of grounds upon which the jurisdiction of this Court is invoked.

STATUTES, AND REGULATIONS INVOLVED

The Respondent, Seminole Tribe of Florida, accepts the Petitioners' statement of Constitutional provisions, statutes, and regulations involved in the case, but supplements said statement as follows:

The Administrative Procedure Act 5 U.S.C. 702

Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed

nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

The Quiet Title Act, 28 U.S.C. §2409a

Real property quiet title actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1982 (43 U.S.C. 666).

STATEMENT OF THE CASE

The Respondent, the Seminole Tribe of Florida, accepts the Petitioner's Statement of the Case with respect to the course of judicial proceedings below. However, the Respondent supplements the factual allegations of the Statement of the Case by explaining that the Complaint filed by the Petitioner against the United States Department of Interior and its Secretary, sought a declaration that the Defendant's acquisition of a small tract of real estate in Hillsborough County, Florida, in trust for the Seminole Tribe of Florida, was void and of no force and effect. The Complaint sought to divest the United States of its fee ownership to said real property.

SUMMARY OF ARGUMENT

I.

No conflict exists between the within decision of the United States court of appeals and Land v. Dollar, 330 U.S. 731, 91 L.Ed. 1209, 67 S.Ct. 1009 (1947), in that the facts and legal issues addressed in Land v. Dollar are completely distinguishable from the facts and legal issues considered by the court of appeals decision in this action.

In addition, the holding in Land v. Dollar has been limited by this Court's opinions in Larsen v. Domestic and Foreign Commerce Corporation, 337 U.S. 682, 93 L.Ed. 1628, 69 S.Ct. 1457 (1949); Malone v. Bowdoin, 369 U.S. 643, 8 L.Ed.2d 168, 82 S.Ct. 980 (1962); Block v. North Dakota ex rel. Board of University and School Lands, 461 U.S. 273, 75 L.Ed.2d 840, 103 S.Ct. 1811

(1983). Land v. Dollar has continuing validity only in connection with claims for "an unconditional taking of property without just compensation", and those issues are not raised in the within action.

The Eleventh Circuit opinion in this cause does not conflict with Eaton v. Dorchester Development, Inc., 692 F.2d 727 (11th Cir. 1982), in that the facts and law raised in that decision are clearly distinguishable from the facts and law of the within action.

Further, an alleged conflict between two decisions of the same circuit court of appeals will not support conflict jurisdiction so as to authorize review on certiorari.

II.

The opinion of the Court of Appeals in this action does not conflict

with Florida Department of State v. Treasure Salvors, Inc., 458 U.S. 670, 73 L.Ed.2d 1057, 102 S.Ct. 3304 (1982). The factual and legal issues raised by the Treasure Salvors opinion are entirely distinguishable from the facts and legal issues in the within cause.

III.

This Court's prior decision in Block v. North Dakota, ex rel. Board of University and School Lands, 461 U.S. 273 75 L.Ed.2d 840, 103 S.Ct. 1811 (1983) is controlling. In Block, this Court held that the Quiet Title Act of 1972 ("QTA") constituted the exclusive means by which the United States' title to real property could be challenged. The provisions of the QTA do not apply to "trust or restricted Indian lands".

ARGUMENT I

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DOES NOT CONFLICT WITH LAND v. DOLLAR, 303 U.S. 731, 91 L.Ed. 1209, 67 S.Ct. 1009 (1947) AND EATON v. DORCHESTER DEVELOPMENT, INC., 692 Fed.2d 727 (11th Cir. 1982)

The Petition for Writ of Certiorari is predicated upon an alleged conflict between the Eleventh Circuit Court of Appeals decision in this case and the Supreme Court Opinion in Land v. Dollar, 330 U.S. 731, 91 L.Ed. 1209, 67 S.Ct. 1009 (1947). The factual and legal issues raised by the Eleventh Circuit decision in this case are entirely distinguishable from the factual and legal issues addressed in Land v. Dollar and accordingly, there is no true conflict between these decisions so as to warrant review on certiorari.

In Land v. Dollar, suit was commenced by stockholders of Dollar Steamship Lines, Inc., Ltd., to recover

shares of stock endorsed in favor of the United States Maritime Commission. The stock certificates were transferred to the Maritime Commission in connection with certain contracts and loan agreements entered into between the parties. After all loans were paid, the stockholders demanded a return of all shares of stock pledged to secure the loan. Members of the Commission refused to surrender the shares, claiming that full ownership to the certificates had been conveyed to the Commission.

The stockholders filed suit in the district court, alleging that the Maritime Commission had unlawfully converted the stock certificates. The district court dismissed the complaint, with prejudice, holding that the suit was against the United States and barred by the doctrine of sovereign immunity.

The court of appeals reversed the district court's dismissal and the Maritime Commission sought review via certiorari. The Supreme Court affirmed the reversal by the court of appeals, noting that the members of the Maritime Commission could become tort-feasors by unlawfully seizing and holding a citizen's property without authority. The Court explained that if a trial upon the merits revealed that the contract was illegal or that the shares were merely pledged as security, then the shareholders might be entitled to possession of the certificates. Hence, the court held that a decision upon the merits was necessary in order to determine whether the Maritime Commission was wrongfully withholding the stock certificates.

The within case presents facts which are substantially different

from the facts in the Land v. Dollar decision. In the within case, there is no claim against the United States for the confiscation of any property alleged to be owned by the Petitioners. In fact, the Petitioners admit that the property in question was, at all times material, owned by the United States, in trust for the benefit of the Seminole Tribe, pursuant to federal law.

In Land v. Dollar, supra, a factual controversy existed between the stockholders and the Maritime Commission, as to whether the stock certificates were pledged or sold outright and a trial was necessary to resolve that fundamental dispute. In the within cause, there is no factual dispute regarding the manner in which land owned by the Seminole Tribe of Florida was taken into trust by the Secretary of the Interior. The Petitioners have alleged

that the Secretary waived the regulations codified under Chapter I of Title 25 of the Code of Federal Regulations, as authorized pursuant to 25 C.F.R. Section 1.2 (1971). All parties to this action agree that the Secretary waived said regulations, because the Secretary found such waiver to be in the best interests of the Seminole Tribe. Unlike the circumstances existing in Land v. Dollar, supra, the within case involves no dispute as to how the property was acquired by the United States and there is simply no need to proceed with a trial to resolve uncontroverted facts.

The alleged conflict between Land v. Dollar and the within case is also distinguishable upon the law. In Land v. Dollar, supra, the stockholders alleged that Section 207 of the Merchant Marine Act authorized the Maritime Commission to acquire stock only as

collateral. The complaint therefore alleged that members of the Commission acted ultra viries their statutory authority, by asserting ownership to the stock.[1] The statutory provisions regarding the Secretary of Interior's acquisition of trust properties for the benefit of the Indians, contain no such express prohibitions, and even authorize a complete waiver of regulations when such a waiver is deemed to be in the best interest of the Indians. 25 C.F.R. §1.2 (1971).

Further, the Petitioners' reliance upon Land v. Dollar, supra, and United States v. Lee, 106 U.S. 196, 27 L.Ed. 171, 1 S.Ct. 240 (1882), is misplaced, in that said decisions have been circumscribed by later Supreme Court

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[1]See discussion of Land v. Dollar decision in Larsen v. Domestic and Foreign Commerce Corporation, 337 U.S. 682, 702 n. 26; 93 L.Ed. 1628, 1642, n. 26 (1949).

opinions. See Larsen v. Domestic and Foreign Commerce Corporation, 337 U.S. 682, 93 L.Ed. 1628, 69 S.Ct. 1457 (1949); Malone v. Bowdoin, 369 U.S. 643, 8 L.Ed.2d. 168, 82 S.Ct. 980 (1962); Block v. North Dakota ex rel. Board of University and School Lands, 461 U.S. 273, 75 L.Ed.2d 840, 103 S.Ct. 1811 (1983). In Malone, the Supreme Court analyzed the principles advanced in United States v. Lee, supra, and subsequent cases relying thereon, including Land v. Dollar, supra. The Court noted that the Lee case was limited by the opinion in Larsen v. Domestic and Foreign Commerce Corporation, supra, and clarified the limited validity of the Lee decision as follows:

> While not expressly overruling United States v. Lee, the Court in Larsen limited that decision in such a way as to make it inapplicable to the case before us. Pointing out that at the time

> of the Lee decision there was no remedy by which the plaintiff could have recovered compensation for the taking of his land, the Court interpreted Lee as simply "a specific application of Constitutional exception to the doctrine of sovereign immunity". So construed, the Lee case has continuing validity only "where there is a claim that the holding constitutes an unconditional taking of the property without just compensation". (emphasis added).

The Malone Court observed that no claim for "an unconstitutional taking of property without just compensation" was advanced in the case and, therefore, placed no reliance upon the Lee rationale.

Similarly, the within case does not involve a claim that the United States has taken property without just compensation. Accordingly, the decisions in United States v. Lee and Land v. Dollar, simply do not apply to the legal issues raised in the within case.

The Petition for Writ of Certiorari

also alleges that the Eleventh Circuit decision in this cause conflicts with Eaton v. Dorchester Development, Inc., 692 F.2d 727 (11th Cir. 1982). An alleged conflict between two decisions rendered by the Court of Appeals for the Eleventh Circuit, does not support conflict jurisdiction so as to authorize review on certiorari. Wisniewski v. United States, 353 U.S. 901, 1 L.Ed.2d 658, 775 S.Ct. 633 (1957). In Wisniewski, the Supreme Court dismissed a certified question to resolve conflicting decisions within the Eight Circuit, opining at page 659:

> This undoubtedly raises problems when one panel has doubts about a previous decision by another panel of the same Court. . . . Doubt about the respect to be accorded to a previous decision of a different panel should not be the occasion for invoking so exceptional a jurisdiction of this Court as that on certification. It is primarily the task of a Court of Appeals to reconcile its internal difficul-

ties. See Re Burwel, 350 U.S. 521, 100 L.Ed 666, 76 S.Ct. 539; Western Pacific R. Corp. v. Western Pacific R. Co., 345 U.S. 247, 97 L.Ed 986, 73 S.Ct. 656 (emphasis added).

This Court's judicial discretion to resolve important matters upon certiorari should not be exercised to merely harmonize decisions of the same circuit court which are alleged to be in conflict. Rule 17 of the Rules of the Supreme Court of the United States (1980), provides no basis for review on certiorari of conflicting opinions within the same circuit court of appeals.

Nevertheless, the alleged conflict between Eaton v. Dorchester Development, Inc., supra, and the within decision is clearly distinguishable upon the facts. In Eaton, the trial court dismissed a complaint seeking rescission of certain contracts for the purchase of condominium units, which complaint based

federal jurisdiction upon the Interstate Land Sales Full Disclosure Act. Said Act provides federal subject matter jurisdiction in actions involving the development of subdivisions containing more than 100 units. A factual dispute arose as to whether the subdivision in question contained sufficient units to be governed by the Interstate Land Sales Full Disclosure Act. Although the factual disputes remained unresolved, the trial court dismissed the Complaint on the grounds that the development contained less than 100 units, thereby depriving the federal courts of subject matter jurisdiction. The court of appeals reversed the decision, finding that jurisdiction depended on facts which must be developed at trial.

The within case presents no disputed facts relative to subject matter jurisdiction and no party has ever

questioned the federal courts' jurisdiction in this cause. The method employed by the Secretary of Interior in connection with acquisition of lands in trust for the benefit of the Seminole Indian Tribe is set forth under the Complaint and the record below and those facts are not contested.

The Petitioners' have failed to show any conflict between the court of appeals decision in this cause and the cases cited above, and the Petition for Writ of Certiorari should be denied.

ARGUMENT II

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DOES NOT CONFLICT WITH FLORIDA DEPARTMENT OF STATE v. TREASURE SALVORS, INC., 458 U.S. 670, 73 L.Ed.2d 1057, 102 S.Ct. 3304 (1982) OR WITH ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATION, INC. V. CAMP, 397 U.S. 150, 25 L.Ed.2d 184, 90 S.Ct. 827 (1970)

The alleged conflict between the decision of the Court of Appeals for the Eleventh Circuit in this cause and the decision in Florida Department of State v. Treasure Salvors, Inc., 458 U.S. 670, 73 L.Ed.2d 1057, 102 S.Ct. 3304 (1982) is clearly distinguishable upon both the legal and factual issues raised by each case.

In Florida Department of State v. Treasure Salvors, Inc., supra, this Court held that the Eleventh Amendment did not prohibit the federal district court from executing a warrant to compel

the transfer of certain artifacts from state officials to the jurisdiction of the federal court. After noting that the state advanced no statutory basis for the withholding of the artifacts and that the state officials had no colorable claim to possession of the goods, this Court held that the warrant could issue against specific property within the custody of state officers.

The facts of the Treasure Salvors case are significantly different from the facts of the within case. Under Treasure Salvors, the State cited no statutory provisions which would reasonably authorize the State to retain possession of the artifacts. In the case at bar, the Secretary of the Interior has statutory authority to accept lands into trust for the benefit of the Seminole Tribe, in accordance with 25 U.S.C. Section 465, et seq.,

which statute allows the Secretary to acquire lands in trust for the purpose of providing land for Indians. Further, under Treasure Salvors, the State did not have a "colorable claim" to possession of the artifacts in question. In the within case, the United States holds record fee simple title to the real property as authorized under 25 U.S.C. 465.

In addition to the factual distinctions between Treasure Salvors and the within cause, the legal questions presented by each case are also markedly different. First, Treasure Salvors deals with state sovereign immunity under the Eleventh Amendment; no issues of state sovereign immunity are present in the within case. Second, under Treasure Salvors, the Court was confronted with the narrow issue of whether the State of Florida could be

compelled, by federal process, to deliver possession of property to the United States Marshall. This Court confined its decision to the issue of "possession", and specifically declined to determine "ownership" of the disputed artifacts, explaining at page 699:

> The Eleventh Amendment thus did not bar the process issued by the district court to secure possession of the artifacts of the Atocha held by the named state officials. The proper resolution of this issue, however, does not require - or permit - a determination of the state's ownership of the artifacts.

In this action, the State of Florida seeks to divest the United States of fee simple title to real property by seeking a declaration that the United State's title to the property be considered void and that the title to the property revert back to the Seminole Tribe of Florida. Accordingly, the within action directly challenges the

sovereign's ownership of the property, in stark contrast to the Treasure Salvors opinion.

Lastly, the Petitioners suggest that the Eleventh Circuit decision in this cause conflicts with the decision of Association of Data Processing Organization, Inc. v. Camp, 397 U.S. 150, 25 L.Ed.2d 184, 90 S.Ct. 827 (1970). The Data Processing opinion was cited by the Petitioners in connection with the standing arguments raised before the court of appeals. However, the Eleventh Circuit decision ruled that the lawsuit was barred by the doctrine of sovereign immunity and the Court did not even address the standing question. Accordingly, there is simply no conflict between the Eleventh Circuit decision in this cause and the Data Processing opinion.

Because no conflict exists between

the court of appeals decision in this cause and Treasure Salvors or Data Processing, the Petition for Writ of Certiorari should be denied.

ARGUMENT III

THIS COURT'S PRIOR DECISION IS CONTROLLING AND THE PETITIONERS' ARGUMENT IS WITHOUT MERIT

While the Petitioners' action against the Secretary of Interior was styled as an "officer's suit", a review of the Complaint reveals that the action represents a direct attempt to divest the United States of fee ownership to real property. This Court has held in Block v. North Dakota, ex rel. Board of University and School Lands, 461 U.S. 273, 75 L.Ed.2d 840, 103 S.Ct. 1811 (1983) that the Quiet Title Act of 1972 ("QTA"), codified at 28 U.S.C. 2409(a), constitutes the exclusive

means by which claimants may challenge the United States' title to real property.

In Block, the State of North Dakota filed suit against several federal officers to resolve an ownership dispute regarding certain portions of a river bed claimed by both the state and the United States. The suit requested injunctive and mandamus relief, together with a declaratory judgment for the purpose of determining ownership of the river bed. The relief demanded by the State of North Dakota in the Block case, and the relief sought by the State of Florida in the within action are virtually identical; both states have proceeded with declaratory actions in an effort to divest the United States of title to real estate.

In Block, the District Court rendered judgment quieting title in

favor of North Dakota and the court of appeals affirmed. This Court granted certiorari in order to consider whether the QTA, and its statute of limitations, were applicable to the states.

This Court discussed the "officer's suit" as a possible vehicle for obtaining an adjudication of United States' real property interests. After surveying the decisions which addressed such federal officer litigation, this Court observed that "in the decade after Malone, claimants having disputes with the United States over real property met with little success in most courts".[2] In Block, this Court focused

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[2]Most such claims have been asserted under the Administrative Procedure Act. The within suit is not authorized under the APA, because the agency action in question "is committed to agency discretion in law". 5 U.S.C. §701(1). The provisions of 25 U.S.C. §465 allow the Secretary, "in his discretion, to acquire . . . land for Indians" and 25 C.F.R. §1.2 authorizes the Secretary to waive all regulations when a waiver is

upon the legislative history surrounding the QTA, and held that claimants may not attack the federal government's title to land under an officer's suit theory. Specifically, the Court held at page 1819:

> We hold that Congress intended the QTA to provide the exclusive means by which adverse claimants could challenge the United States title to real property (emphasis added).

While the QTA provides the exclusive means to challenge the federal government's title to real estate, that act also provides that "this section does not apply to trust or restricted Indian lands . . ." This Court expressed a concern with the filing of an officer's suit in an attempt to vitiate the Indian lands "exception" to the QTA and

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when a waiver is in the best interests of the Indians. Such broad discretion is simply not subject to judicial review. Panama Canal Company v. Grace Line, 356 U.S. 309, 79 S.Ct. 752, 2 L.Ed.2d 788 (1958).

explained, at page 1818, that, "If we were to allow claimants to try the federal government's title to land under an officer's suit theory, the Indian land's exception to the QTA would be rendered nugatory".

The Petitioners' reliance upon the Administrative Procedure Act ("APA"), in an effort to elude the limitations imposed under the QTA with respect to "trust or restricted Indian lands" is prohibited by §702 of the APA. Specifically, 5 U.S.C. §702 of the APA provides as follows:

> Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief <u>if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought</u>. (emphasis added)

Certainly the provisions of the QTA grant "consent to suit" and that act

expressly forbids the assertion of claims against lands held in trust for Indians. Therefore, the APA provides no basis for the Petitioners' action to remove title to Indian trust lands from the United States.[3]

The issues resolved by Block v. North Dakota, supra, are virtually identical to the issues presented in the Petition for Writ of Certiorari and that decision is controlling. Because this Court has already decided these matters, the Petition for Writ of Certiorari should be denied.

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[3]This Court, in Block v. North Dakota ex rel. Board of University and School Lands, supra, recognized that the APA did not create an additional means to divest the United States of its titular interests in real property. This Court noted, at page 1819, n.22, that "§702 provides no authority to grant relief when Congress has dealt in particularity with a claim and has intended a specified remedy to be the exclusive remedy." As discussed herein, the QTA constitutes the exclusive remedy by which the state may challenge the sovereign's ownership of real property.

CONCLUSION

In light of the foregoing argument and citation of authorities, the Respondent respectfully submits that the Petition for Writ of Certiorari fails to set forth any conflict between the decision of the United States Court of Appeals for the Eleventh Circuit in this cause and any opinion rendered by this Court or any federal court of appeals. The Petition for Writ of Certiorari further fails to set forth any other special considerations which would support a review of the merits on Certiorari, and the Respondent requests that the Petition for Writ of Certiorari be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12 day of December, 1985, a true and correct copy of the foregoing was furnished, via U.S. Mail, postage prepaid, to **F. HENRY HABICHT, II, ESQ.**, Assistant Attorney General, Department of Justice, Washington, DC 20530; **ROBERT W. MERKLE, JR., ESQ.**, United States Attorney, Robert Timberlake Bldg., Room 410, 500 Zack Street, Tampa, FL 33602; **J. CAROL WILLIAMS, ESQ.**, and **WENDY B. JACOBS, ESQ.**, Department of Justice, Land and Natural Resources Division, Washington, DC 20530; **HAROLD F. X. PURNELL, ESQ.**, General Counsel, Department of Business Regulation, 725 S. Bronough Street, Tallahassee, FL 32301; **JOSEPH C. MELLINCHAMP, ESQ.**, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, FL 32301;

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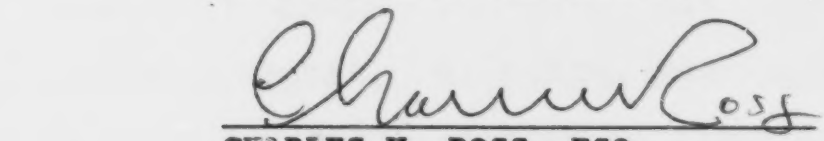
Respectfully submitted,



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No. 85-821

Supreme Court, U.S.
FILED
JAN 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF FLORIDA, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below correctly dismissed petitioners' suit challenging the Secretary of the Interior's action in taking a parcel of land in trust for the Seminole Tribe pursuant to 25 U.S.C. 465.

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STATE OF FLORIDA, ET AL., PETITIONERS

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-55a) is reported at 768 F.2d 1248. The order of the district court (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 1985, and the petition for a writ of certiorari was filed on November 14, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1980, petitioner City of Tampa unearthed an Indian burial site in the course of a construction project. In order to enable the project to go forward, the City entered into an agreement with respondent Seminole Tribe of Florida, under which the numerous Indian artifacts and skeletal

remains were to be transferred to the Tribe. The Tribe in turn was to acquire a site in Hillsborough County, Florida, on which to construct a museum for display of the artifacts and to inter the remains. The Tribe bought an 8.5-acre parcel of land for these purposes, and it thereafter petitioned the Secretary of the Interior to acquire title to the land in trust pursuant to Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. 465. Pet. App. 15a-16a.

Under 25 U.S.C. 465 the Secretary is authorized, "in his discretion," to acquire land "for the purpose of providing land for Indians," with the title to be taken in the name of the United States in trust for the tribe or individual Indians concerned. In governing regulations, now codified at 25 C.F.R. 151.10, the Secretary has identified certain factors to be considered in determining whether to take land in trust.[1] However, the Secretary has retained the authority to

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[1] 25 C.F.R. 151.10 provides:

§ 151.10 Factors to be considered in evaluating requests.

In evaluating requests for the acquisition of land in trust status, the Secretary shall consider the following factors:

(a) The existence of statutory authority for the acquisition and any limitations contained in such authority;

(b) The need of the individual Indian or the tribe for additional land;

(c) The purposes for which the land will be used;

(d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;

(e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;

(f) Jurisdictional problems and potential conflicts of land use which may arise; and

waive those provisions "in all cases where permitted by law and the Secretary finds that such waiver * * * is in the best interest of the Indians." 25 C.F.R. 1.2.

On January 16, 1981, the Secretary accepted the Seminole Tribe's 8.5-acre parcel in trust under 25 U.S.C. 465 (Pet. App. 21c-25c). In so doing, he exercised the power reserved under 25 C.F.R. 1.2 to waive the provisions of the trust acquisition regulations (Pet. App. 18c-21c), concluding that the waiver "would be in the best interest of the Indians" (Pet. App. 18c). The Secretary explained that the particular property presented an "unusual" situation, "because of the unique cultural significance of its intended use" (*id.* at 19c). In the Secretary's view, it was appropriate to consider—in addition to the factors normally taken into account in acquiring land in trust—the policy of the Indian Religious Freedom Act of 1978, 42 U.S.C. 1996, to protect and preserve the Indians' use and possession of sacred objects.[2]

Shortly after the United States accepted the property in trust, the Tribe prepared an interment site for the Seminole remains, erected a cultural museum, and developed a center for exhibiting Indian art and craftwork. In addition, the Tribe began operation of a "Smoke Shop," at which cigarettes were sold, tax free, to the general public. Pet. App. 18a.

(g) If the land to be acquired is in fee status whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

[2]42 U.S.C. 1996 provides:

On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

2. Petitioners (the State of Florida, its Departments of Business Regulation and Revenue, and the City of Tampa) then brought this suit in the United States District Court for the Middle District of Florida to challenge the United States' acquisition of the property in trust for the Tribe. Petitioners sought: (i) a declaratory judgment that the acquisition was void because the Secretary did not adhere to the standards in the governing regulations (now 25 C.F.R. 151.10) for acquiring property in trust for Indians, and (ii) an injunction prohibiting the United States from treating the property as being held in trust for the Seminole Indians (Pet. App. 16c). The Tribe was granted leave to intervene (*id.* at 18a-19a). Thereafter, in a brief order, the district court granted the motion of the Secretary and the Tribe to dismiss the complaint (Pet. App. 1a-2a). It held that petitioners lacked standing to bring the suit and that the court lacked jurisdiction because the United States had not waived its sovereign immunity with respect to the subject matter of the suit.[3]

3. The court of appeals affirmed on the ground that the suit is barred by the sovereign immunity of the United States (Pet. App. 5a-55a).[4] The court first determined that the United States is the real party in interest in this case, even though petitioners named the Secretary of the Interior as the defendant, because petitioners seek "to divest the United States of its title to the land" and because, "[c]learly,

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[3]Petitioners had moved to amend their complaint to allege that the Tribe was conducting bingo games on the property, that the Tribe was not collecting the state sales tax on taxable transactions occurring on the land, and that the property was listed on the Hillsborough County tax rolls as being tax-exempt. However, the district court granted the motion to dismiss without ruling on the motion to amend the complaint. Pet. App. 19a.

[4]The court of appeals therefore did not reach the question of petitioners' standing to bring this suit. Pet. App. 54a.

this relief would operate against the sovereign" (*id.* at 23a).[5] The court rejected petitioners' contention that this case could proceed as an "officer's suit," under *United States* v. *Lee*, 106 U.S. 196 (1882), to challenge the authority of the Secretary of the Interior to take the land in trust (Pet. App. 23a-31a). The court observed that petitioners did not suggest that the Secretary was without statutory authority to accept the land in trust, since 25 U.S.C. 465 expressly authorized him to do so. It further observed that petitioners challenged neither the constitutionality of the Secretary's actions nor the constitutionality of the statute under which he acted (*id.* at 26a-29a). Thus, petitioners' "only complaint" was that "the Secretary abused his discretion by waiving consideration of the factors delineated in the [trust acquisition] regulations" (*id.* at 27a). However, the court understood those regulations merely to identify factors to be considered by the Secretary in the exercise of his discretion, not to constrain the Secretary's authority under 25 U.S.C. 465 to acquire land in trust. For this reason, the court concluded that petitioners "have failed to demonstrate that the Secretary exceeded his authority," and it accordingly held that this suit could not proceed as an officer's suit (Pet. App. 30a).

Having concluded that the suit must be regarded as one against the United States, the court of appeals rejected petitioners' contention that the United States had waived its

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[5]The court of appeals observed that petitioners initially acquiesced in the Secretary's decision to take the land in trust, and protested only after the Tribe began to sell cigarettes and operate bingo games on the land. For this reason, the court explained, the gravamen of petitioners' complaint concerns the Tribe's conduct, not the decision of the United States to hold the land in trust. But the court noted that if the United States were to be divested of its title to the land, the State presumably could take steps to end the conduct to which it objects. Pet. App. 22a-23a.

immunity to suit (Pet. App. 32a-54a). The court of appeals recognized that under the Administrative Procedure Act (APA), 5 U.S.C. 702, Congress has waived the immunity of the United States in a suit against an officer of the United States for non-monetary relief. But the court relied on the final sentence of 5 U.S.C. 702, which provides that that section is not to be read as "authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." The court found such a prohibition in the Quiet Title Act (QTA), 28 U.S.C. 2409a.

The QTA grants consent to bring an action against the United States to adjudicate disputed title to property in which the United States claims an interest, but expressly does not apply to "trust or restricted Indian lands" (28 U.S.C. 2409a(a)). The court of appeals reasoned that, under this Court's decision in *Block* v. *North Dakota,* 461 U.S. 273, 280-286 & n.22 (1983), the QTA is the exclusive means by which a person may challenge the United States' title to land and that such a suit therefore may not be brought against a federal officer under the APA, 5 U.S.C. 702, for that purpose. The court of appeals recognized that petitioners do not assert an adverse interest in the 8.5-acre parcel or seek to have title to that parcel quieted in themselves. But, in the court's view, the statutory prohibition against suits to quiet title to Indian trust lands reflects a congressional determination to prevent third parties from interfering with the trust relationship between the Indians and the United States—a policy that applies equally in this case because petitioners seek to divest the United States, as trustee, of its title to the land. Pet. App. 33a-41a.

The court of appeals believed that its conclusion that Congress did not intend to countenance interference by third parties with the United States' trust relationship with the Indians was bolstered by the fact that agency action is

unreviewable in any event under the APA if it "is committed to agency discretion by law." In finding this exception to be applicable here, the court reasoned that the relevant statute, 25 U.S.C. 465, expressly authorizes the Secretary, "in his discretion," to acquire land in trust for Indians and imposes no standards for the exercise of that discretion (except to bar the acquisition of land outside the boundaries of the Navajo Reservation). The court also found it significant that the Secretary's decision whether to acquire land in trust "would involve a myriad of factors, including internal management constraints relating to budget limits, the particular needs of the numerous individual Indians and Indian tribes, the proposed use of the land, and government resources for overseeing the land" (Pet. App. 49a). Against this background, the court concluded that "the Secretary [must] have broad discretion when reviewing an application for land acquisition" (*ibid.*). The court rejected petitioners' contention that the factors listed in 25 C.F.R. 151.10 furnish sufficient "law" to be applied by a court in reviewing a decision by the Secretary to take particular land in trust. In the court's view, the regulations merely guide the exercise of the Secretary's discretion, because they do not purport to state how the agency should balance the various factors (Pet. App. 51a-54a).

ARGUMENT

The court of appeals correctly concluded that the Secretary's decision to accept the 8.5-acre parcel of land in trust for the Seminole Tribe is not subject to judicial review. Its holding does not conflict with any decision of this Court or of another court of appeals, and review therefore is not warranted.

1. The court of appeals was clearly correct in concluding that because petitioners seek "an order divesting the United States of its title to land held for the benefit of an Indian

tribe" (Pet. App. 38a), the relief "would operate against the sovereign" (*id.* at 23a). See *Hawaii* v. *Gordon*, 373 U.S. 57, 58 (1963); *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963); *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 687-688 (1949). Congress has not waived the sovereign immunity of the United States to such a suit.

The Quiet Title Act provides that the United States may be named as a party defendant in a "civil action * * * to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. 2409a(a). However, the QTA expressly does not apply to "trust or restricted Indian lands" (*ibid.*). In *Block* v. *North Dakota*, the Court held that "Congress intended the QTA to provide the exclusive means by which adverse claimants could challenge the United States' title to real property." 461 U.S. at 286. The Court accordingly rejected the contention that a party could contest the United States' title to real property simply by bringing an action against the responsible federal officer, either under the APA or pursuant to other authority. See 461 U.S. at 280-286 & n.22.[6] Otherwise, the Court reasoned, "all of the carefully crafted provisions of the QTA deemed necessary for the protection of the national public interest could be averted." *Id.* at 284-285.

In particular, the Court observed in *Block* v. *North Dakota* that if it "were to allow claimants to try the Federal Government's title to land under an officer's-suit theory, the

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[6]With respect to the APA, the Court observed in *Block* v. *North Dakota* that the last sentence of 5 U.S.C. 702 states that it confers no authority to grant relief "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." The Court concluded that the QTA is an "other statute" within the meaning of this sentence, because the QTA "forbids the relief" sought if the conditions it imposes on Congress's consent to suit are not satisfied. See 461 U.S. at 286 n.22.

Indian lands exception to the QTA would be rendered nugatory." 461 U.S. at 285. Yet that is preceisely what petitioners have attempted to do here. In this suit against the Secretary of the Interior, petitioners challenge the United States' title to the 8.5-acre parcel, contending that the Secretary's acceptance of title on behalf of the United States, in trust for the Seminole Tribe, was "void" (Pet. 25; Pet. App. 16c). They thereby attempt to render nugatory the express exception in the QTA for Indian trust lands.

To be sure, the petitioners in this case are not adverse claimants, in the sense that they do not actually seek to quiet title to the land in themselves. But as the court of appeals observed (Pet. App. 38a-41a):

> Congress chose to preclude an adverse claimant from divesting the United States' title to Indian lands held in trust. It would be anomalous to allow others, whose interest might be lesser than that of an adverse claimant, to divest the sovereign of title to Indian trust lands.

This suit therefore is barred by the exception to the QTA for Indian trust lands.[7]

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[7]Petitioners' reliance (Pet. 26-29) on *United States* v. *Lee, supra; Larson* v. *Domestic & Foreign Corp*, 337 U.S. 682 (1949); and *Malone* v. *Bowdoin*, 369 U.S. 643 (1962), is misplaced. As this Court concluded in *Block* v. *North Dakota* with respect to these very cases, any means the officer's suit might once have afforded for adjudicating the United States' title to property has been superseded by the QTA. See 461 U.S. 281-282. Petitioners' reliance (Pet. 22-26) on *Land* v. *Dollar*, 330 U.S. 731 (1947), is misplaced for the same reason. That case did not involve a situation in which Congress intended a form of action other than an officer's suit to be the exclusive means for the adjudication of the particular issue.

Finally, *Florida Department of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670 (1982), upon which petitioners also rely (Pet. 29-31), lends no support to their position. There the plurality opinion concluded that, under the rationale of *Larson*, the suit against the state officers for possession of the property in question was not barred by the Eleventh

2. Quite aside from the independent bar to suit that derives from the QTA, petitioners have no right of action under the APA itself in this case. The APA does not provide a cause of action for judicial review where the "agency action is committed to agency discretion by law." 5 U.S.C. 701(a)(2). The court of appeals correctly held that the Secretary's decision to accept the land in trust for the benefit of the Seminole Tribe was committed to the Secretary's discretion under this provision and therefore is not subject to judicial review. Under 25 U.S.C. 465, "[t]he Secretary * * * is authorized, *in his discretion,* to acquire" land in trust (emphasis added), and the statute does not identify the circumstances in which such an acquisition is appropriate. Compare *Heckler* v. *Chaney,* No. 83-1878 (Mar. 20, 1985), slip op. 13. Moreover, the nature of the decision the Secretary must make reinforces the conclusion that it is one committed to his discretion. As the court of appeals explained (Pet. App. 48a-49a), whether to acquire a parcel in trust requires a consideration of a number of factors, including budget and program limitations, the needs of the Indians concerned, and the impact on the local community. Thus, 25 U.S.C. 465 is " 'drawn in such broad terms that in a given case there is no law to apply.' " *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 410 (1971). See also *Heckler* v. *Chaney,* slip op. 8-9; *Panama Canal Co.* v. *Grace Line, Inc.,* 356 U.S. 309, 317-319 (1958).

Amendment, because it was essentially undisputed that the state officers were acting beyond the scope of their authority by withholding possession of the artifacts from the private plaintiff. 458 U.S. at 692-697. But the plurality opinion expressly did not address the application of sovereign immunity principles in a case involving the government's *ownership* of the property in question—the issue involved in this case. *Id.* at 697, 699. In addition, *Treasure Salvors,* like the decisions discussed in the first paragraph of this footnote, did not involve a situation in which Congress had designated another form of action as the exclusive means of adjudicating the disputed question.

Petitioners in fact concede that 25 U.S.C. 465, when read in conjunction with 5 U.S.C. 701(a)(2), "would appear to prohibit judicial review." See Pet. 33. But petitioners argue (Pet. 31-41) that the Secretary has circumscribed his discretion under the statute by adopting the trust acquisition regulations, which identify a number of factors the Secretary will consider when deciding whether to take land in trust, and that a court may review the Secretary's action to determine whether it complies with these regulations. There are several flaws in this argument.

First, as the court of appeals pointed out, the factors listed in the regulations are intended merely to guide the Secretary in the exercise of his discretion. The regulations do not purport to identify the weight to be given each of the various factors or direct how they should be weighed against one another; nor do they circumscribe the Secretary's authority to acquire land in certain areas or limit the size of the tracts that may be acquired. For these reasons, "[t]he factors listed in the regulation are not the kind of legal principles courts are familiar with applying to a particular case" (Pet. App. 52a).

Second, even assuming that the trust acquisition regulations establish binding legal standards where they apply, petitioners' objection in this case nevertheless must fail because the Secretary exercised his reserved authority to waive the application of the regulations if he finds that it is "in the best interest of the Indians" to do so. 25 C.F.R. 1.2. The Secretary made such a finding here. See Pet. App. 18c. A court has no judicially manageable standards for reviewing such a finding by the Secretary. In fact, petitioners do not appear to contend in this case that the acquisition was *not* in the best interest of the Indians; and it cannot be presumed in any event that either Congress or the Secretary would have intended for that question to be litigated in a suit brought by a third party, since it is the Secretary who is

charged by law with implementing the responsibilities of the United States in its capacity as trustee for the Indians. Accordingly, the decision whether to waive the provisions of the trust acquisition regulations in a particular case plainly is one committed to the Secretary's discretion within the meaning of 5 U.S.C. 701(a)(2). It therefore is not subject to judicial review under the APA.[8] This narrow question of reviewability under the particular regulations at issue in this case does not warrant review by this Court.

3. For the foregoing reasons, the Secretary's decision to acquire the 8.5-acre parcel in trust for the Seminole Tribe is not subject to judicial review. To the extent that petitioners are concerned not about the acquisition of the property for purposes of preserving and displaying the artifacts, but rather about the untaxed sale of cigarettes on the tract,

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[8]Petitioners rely (Pet. 34) on language in 25 C.F.R. 1.2 that provides for the Secretary to waive the provisions of applicable regulations "where permitted by law." Petitioners point out that in deciding to grant such a waiver in this case, the Secretary cited 42 U.S.C. 1996, the Indian Religious Freedom Act, which provides that it shall be the policy of the United States, inter alia, to protect and preserve the right of Indians in the "use and possession of sacred objects." See Pet. App. 20c. In petitioners' view, 42 U.S.C. 1996 did not furnish a basis for the waiver in this case because that statute does not affirmatively authorize such a waiver. See Pet. 34. This argument is frivolous.

Petitioners essentially concede (Pet. 33) that, in the absence of the regulations, the Secretary would have had unreviewable discretion to acquire the land in trust. Accordingly, a decision by the Secretary to exercise his retained authority to waive the regulations, and thereby to commit the matter entirely to the discretion of the Secretary under the statute itself, is "permitted by law" (*i.e.*, is "permitted" by 25 U.S.C. 465) within the meaning of 25 C.F.R. 1.2. In any event, the congressional policy in 42 U.S.C. 1996 provides an independent basis for such a waiver in this case. It is irrelevant that, as petitioners point out (Pet. 34), 42 U.S.C. 1996 does not expressly refer to such a waiver. Surely the overriding *statutory* policy to preserve Indian religious freedom permits a waiver of *administrative* regulations that otherwise might frustrate that policy.

this is not the appropriate case in which to address petitioners' concerns. The extent to which state law may be applied on land held in trust for an Indian tribe requires an ad hoc balancing of the relevant federal, state and tribal interests at stake. See, *e.g., Ramah Navajo School Board* v. *Bureau of Revenue,* 458 U.S. 832, 837, 845-846 (1982). The application of particular state laws to conduct on the tract therefore must be resolved on a case-by-case basis when and if the State or its political subdivisions seek to apply a particular law in a manner that affects federal or tribal interests. We also note that, even on an Indian reservation, federal law imposes no absolute barrier to the imposition of state cigarette and other taxes on sales made by Indians to non-Indians. See *Washington* v. *Confederated Tribes,* 447 U.S. 134, 151, 155-157, 161 (1980); *Moe* v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 482-483 (1976); *Seminole Tribe* v. *Butterworth,* 658 F.2d 310, 317 n.9 (5th Cir. 1981), cert. denied, 455 U.S. 1020 (1982). Thus, the mere fact that the 8.5 acres have been taken in trust by the United States does not necessarily oust the application of state revenue laws.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1986